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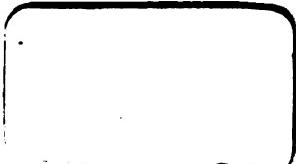
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THE

ONTARIO REPORTS,

VOLUME VIII.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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A TABLE
OF THE
CASES REPORTED IN THIS VOLUME.

A.	Coulter et al., and Smith, Re 536 Counsell et al., The Exchange Bank of Canada v 673
B.	Davis v. Lewis et al 1 Dolson et al., Healey v 691
C.	Elderslie, Corporation of the Township of v. Corporation of the Village of Paisley 270 Exchange Bank of Canada, The v. Counsell et al 673 Exchange Bank of Canada, The v. Stinson 667
D.	Federal Bank of Canada, Carnegie v. 75 Fitzgerald et al. v. Wilson et al 559
E.	Fletcher v. Noble 122 Fox, and The South Half of Lot No. One in the Tenth Concession of Downie 489
F.	Galbraith v. Irving 751 Glass v. Burt 391
G.	Goodrich Tilsonburg Agricultural Manufacturing Co. v..... 565 Graham v. Williams 478 Grand Trunk R. W. Co., Beckett v. 601 Grand Trunk R. W. Co., Hillyard v. 583 Grand Trunk R. W. Co., Pratt v .. 491 Green v. Ponton 471 Graver, Marrin v 39 Grieve v. The Molsons Bank 162 Grimsby, In re Beamer et al. v 98
Adams et al., Yost et al., v 411 Avison et al., Longeway Qui Tam, v. 357	
Barclay et al. v. Zaritz et al..... 663 Becher v. Hoare et al..... 328 Beckett v. Grand Trunk R. W. Co. 601 Beemer et al. v. Grimsby, In re 98 Beigle, Buckley v 85 Biggar, In re—Biggar et al. v. Stinson et al 372 Bliss v. Boeckh et al 451 Boeckh et al., Bliss v 451 Boswell et al., Pella v 680 Bridges v. The Real Estate Loan and Debenture Co 493 Brooks v. Conley et al 549 Bryson et al. v. The Ontario and Quebec R. W. Co. et al 380 Buckley v. Beigle 85 Burn v. Burn 237 Burt v. Glass 391	
Calder et al., Powell v 505 Cameron et al., Thomas v 441 Canada Atlantic R. W. Co. v. City of Ottawa et al..... 183, 201 Carnegie v. Federal Bank of Canada. 75 City of Ottawa et al., Canada Atlantic R. W. Co. v 183, 201 Cole and The Canada Fire and Marine Insurance Co, Re 92 Conley et al., Brooks v..... 549 Cooke and Drifil, Re..... 530 Cooper et al., McCarthy v 316	

H.

Hall, Regina v.....	407
Hazlett et al., Joseph Hall Manufacturing Co., The v	465
Headon v. Millican.....	503
Healey v. Dolson et al	691
Hedrick et al., Zumstein v.....	338
Henry, Ibbottson v	625
Hill et al., Trinity College v	286
Hillyard v. Grand Trunk R. W. Co.	583
Hoare et al., Becher v	328
Hobbs v. The Northern Assurance Co ..	343
Hollister, Regina v.....	750
Howell et al., Willcocks v	576
Hughes, Ward v.....	138
Huston v. Lean	521

L.

Ibbottson v. Henry	625
Irving, Galbraith v.....	751
Ivey et al. v. Knox et al	635

J.

Johnston v. Kræmer	193
Joseph Hall Manufacturing Co., The v. Hazlett et al	465

K.

Keefer v. Roaf et al	69
Kerr, Re, Kerr et al. v. Kerr et al	484
Kidder et al. v. The Smart Manufacturing Co.....	362
Knox et al., Ivey et al. v.....	635
Kræmer, Johnston v	193

L.

Lea and The Ontario and Quebec R. W. Co., Re	222
Lean v. Huston	521
Leitch, Mennie v	397
Lewis et al., Davis v	1
Leyn et al., Wright v.....	88
London and Canada Loan and Agency Co. v. Wallace et al	539
Longeway Qui Tam v. Avison et al..	357

M.

Macdonald v. McLennan	176
Macdonell v. Robinson	53
Macfie v. Pearson	745
Machar, Ross et al. v.....	417
Mackey v. Sherman et al	28
Marrin v. Graver	39
Mennie v. Leitch	397
Mill v. Mill	370
Millican et al. v. Headon	503
Moffatt v. Scratch	147
Molsons Bank v. Turley	293
Molsons Bank, The, Grieve v	162
Muir et al., Porteous et al. v	127
Music Hall Block, In re—Dumble v. McIntosh	225

Mc.

McCarthy v. Cooper et al	316
McCullough, Taylor v	309
McGlaughlin, McKenzie v	111
McIntosh, In re Music Hall Block, Dumble v	225
McKenzie v. McGlaughlin	111
McKim, Stuart v	739
McLennan, Macdonald v	176

N.

Nelson v. Wigle et al	82
Noble, Fletcher v	122
Northern Assurance Co., The, Hobbs v.....	343

O.

Ontario and Quebec R. W. Co. et al., The, Bryson et al. v	380
---	-----

P.

Paisley, Corporation of the Village of, Corporation of the Township of Elderslie v	270
Parkdale et al., West v.....	59
Pearson, Macfie v	745
Pella v. Boswell et al.....	680
Ponton, Green v.....	471
Port Dover and Lake Huron R. W. Co., Smith v	256

Porteous et al. v. Muir et al.....	127	Stuart v. McKim.....	739
Powell v. Calder et al	505	Sutton et al., Stewart v.....	341
Pratt v. The Grand Trunk R. W. Co.	499		
Pullman Car Co., The, Stearn v.....	171		
		T.	
		Taylor v. McCullough	309
R.		Temple v. The Toronto Stock Ex- change	705
Real Estate Loan and Debouture Co.		Thomas v. Cameron et al	441
The, Bridges v.....	493	Thomas, Robertson v.....	20
Regina v. Hall.....	407	Tilsonburg Agricultural Manufactur- ing Co. v. Goodrich	565
Regina v. Hollister.....	750	Toronto Stock Exchange, The, Temple v	705
Regina v. Richardson	651	Travis v. Travis	516
Regina v. Sparham.....	570	Trinity College v. Hill et al.....	286
Regina v. Young.....	476	Turley, Molsons Bank v	293
Richard et al. v. Stillwell..	511		
Richardson, Regina v.....	651		
Roaf et al., Keefer v.....	69		
Robertson v. Thomas.....	20		
Robinson, Macdonell v	53		
Roes et al. v. Machar.....	417		
		W.	
S.		Wallace et al., London and Canada Loan and Agency Co.....	539
Scratch, Moffatt v	147	Ward v. Hughes.....	138
Sherman et al., Mackey v.....	28	West v. Parkdale et al	59
Smart Manufacturing Co., The, Kid- der et al. v	362	Wigle et al., Nelson v.....	82
Smith v. Port Dover and Lake Huron R. W. Co.....	256	Willcocke v. Howell et al.....	576
Smith v. Smith	677	Williams, Graham v	478
Sparham, Regina v.....	570	Wilson, The Corporation of the Town of Stratford v	104
Stearn v. The Pullman Car Co ...	171	Wilson et al., Fitzgerald et al. v....	559
Stewart v. Sutton et al.....	341	Wright v. Leys et al	88
Stillwell, Richard et al. v.....	511		
Stinson, The Exchange Bank of Can- ada v	667		
Stinson et al., In re Biggar, Biggar et al. v	372		
Stratford, The Corporation of the Town of v. Wilson.....	104		
		Y.	
		Yost et al. v. Adams et al.....	411
		Young v. Regina.....	476
		Z.	
		Zavitz et al., Barclay et al. v	663
		Zumstein v. Hedrick et al	338

A TABLE
OF THE
NAMES OF CASES CITED IN THIS VOLUME.

A.

* NAMES OF CASES CITED.	WHERE REPORTED	Page of Vol.
Abbott v. Macfie	2 H. & C. 744	588
Abrey v. Crux.....	L. R. 4 C. P. 37 ..129, 131, 132, 133, 134 ..	135
Acre v. Livingstone	26 U. C. R. 282	196
Adams v. Bancroft.....	3 Sunn. Circ. R. 387	346
Adams v. Loomis	24 Gr. 242	381, 538
Addison v. Mayor, &c. of Borough of Preston	12 C. B. 108	282
Ainley v. Balsden	14 U. C. R. 535	86
Alderson v. Maddison	8 App. Cas. 467	72
Alexandra Park Co. re, Hart's Case	6 Eq. 512	95
Allan v. Dykers	3 Hill (N.Y.) 593, 7 ib. 497	79, 346
Allan v. McTavish.....	8 A. R. 440	642
Allen v. Bennett	3 Taunt. 169	513
Allen v. Sharp.....	2 Ex. 352	630
Althorpe v. Wolfe	22 N.Y. (App.) 355	606
Anderson v. Dougall	13 Gr. 164	490
Andrew v. Andrew.....	1 Ch. D. 410	678
Andrew v. Andrew.....	1 Col. 690	665
Angell v. Duke	L. R. 10 Q. B. 174	133
Arnold v. Higgins	11 U. C. R. 191	630, 632
Aston v. Pye	5 Ves 350	517
Atlanta and West Point R. W. Co. v. Hudson	62 Georgia 680	591, 595
Atwood v. Rosser	30 C. P. 628	369, 360, 361
Audsley v. Horn	26 Beav. 195	373
Austin v. Gibson	4 A. R. 316	695
Avery v. Griffin	6 Eq. 606	381
Ayerst v. Jenkins	L. R. 16 Eq. 275	739

B.

Badham v. Mee	1 Russ. & M. 631	179
Badkin v. Powell	Cowp. 476	629, 631
Bagg's Case	11 Co. 99	711
Bailey, In re, Bailey v. Bailey	12 Ch. D. 272	413
Bailey v. Griffiths	40 U. C. R. 418	695
Bain v. Tothergill	L. R. 6, Ex. 59, S. C.; 7 H. L. 158, 22, 48	
Baker v. Laidlaw	2 Johns 89	345
Baldwin v. Benjamin	16 U. C. R. 52	21
Ball, Ex p. Shepherd, Re	10 Ch. D. 667	310, 315
Ball v. Harris	4 M. & Cr. 284	287, 540
Bank of Montreal v. Haffner	29 Gr. 319	480

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol
Bank of Montreal v. McTavish	13 Gr. 395	643, 645
Bank of Toronto v. Burton	4 P. R. 56	642
Bank of Toronto v. McDonogh	15 C. P. 475	642
Bankart v. Tennant	10 Eq. 141	19
Banmann v. James	L. R. 3 Ch. 508	72, 73
Bamforth v. Rodden	14 Mass. 66	359
Barker, Re	7 H. & N. 117	438
Barnes v. Ward	9 C. B. 392 ; 29 Alb. L. J. 23	586
Baskerville v. Otterson	20 Gr. 379	90
Barton v. Pinkerton	L. R. 2 Ex. 340	51
Bastow v. Bennett	3 Camp. 220	405
Batchelor v. Middleton	6 Ha. 75	90
Bates, Re	40 U. C. R. 284	575
Bayne v. Crowther	20 Beav. 400	180
Baynton v. Collins	27 Ch. D. 604	537
Beattie v. Lord Ebary	L. R. 7 Ch. 777 ; F. H. L. 102	308
Beauchamp v. Winn	L. R. 6 H. L. 234	308
Becket v. Midland R. W. Co	L. R. 3 C. P. 82	61
Beer v. Foakes	11 Q. B. D. 221 ; 9 App. Cas. 605	710
Beer v. London and Paris Hotel Co	20 Eq. 412	72
Belford v. Haynes	7 U. C. R. 464	457
Benbow v. Townsend	1 M. & K. 506	91
Bessant v. Great Western R. W. Co	8 C. B. N. S. 368	586
Bickham v. Cross	2 Ves. Sen. 471	288
Bilbee v. The London, Brighton and South Coast R. W. Co	18 C. B. N. S. 584	614
Billings v. Township of Gloucester	10 U. C. R. 273	189, 202, 215
Bird v. Randall	3 Bur. 1350	578, 579
Birmingham v. Kirwan	2 Sch. & Lef. 452	379
Biscoe v. Ward	1 C. L. T. 129	240
Blackburn v. Lavelle	L. R. 6 App. Cas. 628	346
Blanchfield v. Birdsall	7 U. C. R. 141	125
Bland v. Andrews	45 U. C. R.	740
Bloomer v. Waldron	3 Hill N. Y. 360	546
Blood v. Wilkins	43 Iowa 562	404
Boale v. Dickson	13 C. P. 337	37
Board of Education of Napanee v. Town of Napanee	29 Gr. 395	271
Board of School Trustees of Toronto v. City of Toronto	23 U. C. R. 203	271
Boatman's Fire and Marine Ins. Co. v. Parker	23 Ohio 96	345, 348
Bogg v. Midland R. W. Co	L. R. 4 Eq. 310	557
Bolch v. Smith	7 H. & N. 736	458
Bonathan v. Bowmanville Furniture, etc., Co	31 U. C. R. 413	522
Bonifoot v. Greenfield	1 Leon. 60, Cro. Eliz. 80	161
Bonner v. Great Western R. W. Co	24 Ch. D. 1	554
Boon, Re	41 L. T. N. S. 42	643
Booth v. Briacoe	2 Q. B. D. 496	578
Botham v. Armstrong	24 Gr. 216	669
Botham v. Keefer	2 A. R. 595	556
Bouch v. Sevenoaks, etc., R. W. Co	4 Ex. D. 133	257
Bouldin v. Baltimore	15 Md. 18	684
Boulton v. Town of Peterborough	16 U. C. R. 381	185, 203, 211, 215
Boustead v. Whitmore	22 Gr. 222	387, 388, 389
Bovill v. Turner	2 Chitty's R. 205	405
Bowen v. Hall	6 Q. B. D. 343	578
Bowen v. Lewis	L. R. 9 App. Cas. 890	678

NAMES OF CASES CITED.	WHERE REPORTED.	PAGE OF VOL.
Bowsher v. Watkins	1 R. & M. 277	238, 240, 249, 251
Boyd v. Fitt.....	14 Ir. C. L. 43	404
Bradburn v. Great Western R. W. Co.	L. R. 10 Ex. 1	605
Brandling v. Kent	1 T. R. 60	631
Brayley v. Ellis	9 A. R. 565	643
Breeze v. Midland R. W. Co	26 Gr. 225	500
Brettel v. Williams	4 Ex. 623	513
Brewin v. Austin	2 Keen 212	288
Briggs v. French.....	2 Sum. Cir. R. 257	346
Briggs v. North American &c. Ins. Co.	53 N. Y. 446	349, 356
Bright v. McMurray	1 O. R. 172	149, 199
Brinsmead v. Harrison	L. R. 6 C. P. 584; 7 C. P. 547,	578, 579, 581
Britain v. Rossiter	11 Q. B. D. 123	184, 205
British and American Telegraph Co. v. Colson	L. R. 6 Ex. 108	433
British Columbia &c. Saw Mill Co. v. Nettleship	L. R. 3 C. P. 449	47, 404
Brocklebaud v. Johnson	20 Beav. 211	180
Brock, Municipality of Township of v. Toronto and Nipissing R. W. Co	17 Gr. 425	-
Brook, Re, Ex parte Roberts	10 Ch. D. 100	469
Brooke v. McLean	5 O. R. 209	554
Brooke, In re Brooke v. Brooke,	3 Ch. D. 630	414
Broughton v. Smallpiece	25 Gr. 290	479
Brown v. Barkham	1 P. Wms. 652	287
Brown v. Chadbourne	31 Maine 9	34
Brown v. Dalby	7 U. C. R. 160	310
Brown v. DeTastett	Jac. 284	239
Brown v. Morrow	43 U. C. R. 436	419
Brown v. Sweet	7 A. R. 731	642
Brown v. Watson	47 Maine 161	34
Brown v. Wooten	Jac. 74	579, 581
Bruere v. Wharton	7 Sim. 483	287
Bryant and the Municipality of Pittsburgh, In re	13 U. C. R. 347	215
Buffar v. Bradford	2 Atk. 221	374
Burchell v. Hickisson	50 L. J., C. P. D. 101	586, 591
Burritt v. Corporation of Marlborough	29 U. C. R. 119	100, 103
Burrows v. Leavens	29 Gr. 475	381
Burrows v. The March Gas and Coke Co.	L. R. 5 Ex. 67, 7 Ex. 96	461
Butler v. Duncomb.....	1 P. Wms. 453	287 -

C.

Cafe v. Bent	5 Ha. 24	16
Caledonia R. W. Co. v. The North Bristol R. W. Co.	6 App. Cas. 114	21
Caledonian R. W. Co. v. Dalkers Trustees	7 App. Cas. 259	61
Cameron v. East Missouri	13 U. C. R. 190	185
Cameron, Re	26 Ch. D. 19	413
Cameron v. Wait	27 C. P. 475; 3 A. R. 175	100
Cammell v. Beaver Ins. Co.	39 U. C. R. 1	358
Campbell v. Campbell	29 Gr. 252	643
Campbell v. Shield	44 U. C. R. 449	86
Canada Atlantic R. W. Co. and Cambridge, re	3 O. R. 291	185
Canada Co. v. Pettis	9 U. C. R. 669	497
Canadian Bank of Commerce v. Green ..	45 U. C. R. 81	695

NAMES OF CASES CITED.	WHERE REPORTED.	PAGE OF VOL.
Canadian Bank of Commerce v. Woodward	8 A. R. 347	695
Cannon v. Toronto Stock Exchange	27 Gr. 23	710, 712, 735
Carden v. General Cemetery Co.	4 Bing. N. C. 258	283
Carew's Estate, In re	26 Beav. 197	71
Carncross v. Lorimer	3 McQ. H. L. 829	112
Casnahan v. Grice	15 Moo. P. C. 215	520
Castle v. Wilkinson	6 Ch. 534	381
Cattling v. King	25 W. R. 530	514
Cattanach v. Urquhart	6 P. R. 28	240
Cave v. Hastings	7 Q. B. D. 125	513
Cayley v. Walpole	18 W. R. 782	73
Chamberlain v. King	L. R. 6 C. P. 474	631
Chamberlain v. Turner	31 C. R. 460	86
Chambers County v. Clews	21 Wall. 317	185, 205
Charles v. Dalmane	14 U. C. R. 585	149
Chautauqua County Bank v. White	6 Barb. 599	346
Chrysler v. McKay	3 S. C. R. 436	559, 564
Church v. Fenton	28 C. P. 384, 4 A. R. 159, 5 S. C. R. 240	149, 559, 560
Churcher v. Cousins	28 U. C. R. 540	669
Churcher v. Stanley	24 Gr. 217	669
Citizens Ins. Co. of Canada v. Parsons	L. R. 7 App. Cas. 121	345, 353
City of Toronto and Lake Huron R. W. Co. v. Crookshank	4 U. C. R. 309	220
Clarke v. Buchanan	25 Gr. 559	560, 562
Clarke v. Chambers	3 Q. B. D. 339	588, 589
Clarke v. Village of Palmerston	6 O. R. 616	271
Clavering v. Ellison	7 H. L. Cas. 707	491
Clavering's Case	5 Ves. 490	10
Clay v. Tetley, Re	16 Ch. D. 3	412
Clearwater v. Meredith	1 Wall. 25	184, 205
Clement v. County of Wentworth	22 C. P. 300	202
Clifford v. Lewis	6 Mad. 33	540
Clissold v. Machel	26 U. C. R. 422	580
Cocke v. Jennor	Hob. 66	579, 580
Coe v. Clay	5 Bing. 440	40
Colburn v. Patmore	4 Tyr. 677	578, 580
Cole v. Buckle	18 C. P. 286	86
Coleman, In re	L. R. 1 Ch. 128	648
Coleman v. Glanville	18 Gr. 42	373
Coleman v. Upcott	5 Vin. Abr. 527	515
Coles v. Trecothick	9 Ves. 250	513
Colyer v. Finch	5 H. L. Cas. 922	416, 545
Commis v. Scott	20 Eq. 11	72
Commonwealth of Pennsylvania v. Hamer	1 Local Courts Gazette 108	473, 474
Conger v. Platt	25 U. C. R. 277	226
Cook v. Collingridge	Jac. 607	239
Cooley v. Grand Trunk R. W. Co.	18 U. C. R. 96	586, 599
Cooper v. Phibbs	L. R. 2, H. L. 170	308
Copeland v. Webb	11 W. R. 134	522
Corbett v. Harper	5 O. R. 93	554
Corly v. Hill	4 C. B. N. S. 556	456, 457
Cornish v. Stubbs	L. R., 5 C. P. 334	112
Cornman v. Eastern Counties R. W. Co.	4 H. & N. 781	591
Corporation of County of Welland v. Buffalo & Lake Huron R. W. Co.	30 U. C. R. 147 ; 31 U. C. R. 147	500
Corporation of Houghton v. Freeland	26 Gr. 500	240
Corporation of County of Huron v. Kerr	15 Gr. 265	513, 514

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Corporation of Town of Ingersoll v. Carroll, <i>In re</i>	1 O. R. 488	684
Corry v. Great Western R. W. Co.....	6 Q. B. D. 237 ; 7 Q. B. D. 322,	586
Corser v. Cartwright.....	L. R. 8 Ch. 971 ; 7 H. L. 731,	412,
		540, 547
Coster v. Coster	1 Keen 199	179
Cote v. Stadacona Ins. Co.....	6 S. C. 193	567
Cotsworth v. Bettison	1 Salk. 247	629
Cotter v. Sutherland	18 C. P. 357, 398	149
County of Frontenac v. City of Kingston	30 U. C. R. 584 ; 32 U. C. R. 348,	
	205, 271, 276, 281, 283, 284	
County of Scotland v. Thomas.....	94 U. S. R. 682	185
County of York v. City of Toronto.....	21 C. P. 95	221
Court v. Holland.....	29 Gr. 19 ; 4 O. R. 688	90, 229
Court v. Walsh	1 O. R. 167	232
Cousett v. Bell	1 Y. & C. C. C. 569	252
Cowan's Estate, <i>In re</i> ; Rapier v. Wright.	14 Ch. D. 638	257
Cox v. Barker	3 Ch. D. 359	554
Cox v. Feeney	4 F. & F. 13	57
Crafter v. Metropolitan R. W. Co	L. R. 1 C. P. 300	591
Craig v. Craig	24 Gr. 573 ; 2 A. R. 583	553, 554
Crain v. Trustees of Coll. Institute.....	42 U. C. R. 48	360
Cramer v. Mott	L. R. 5 Q. B. 357	448
Crandall v. Nott	30 C. P. 63	130
Crawford v. Thomas	8 C. P. 67	629
Crawshay v. Collins	15 Ves. 218	239
Creevy v. Carr	7 C. & P. 64	578
Creuze v. Hunter	2 Ves. Ir. 159	287
Cropper v. Smith	26 Ch. D. 700	522
Crosby v. Leng	12 East 409	310, 311
Crow v. Wood	13 Beav. 271	267
Crowe v. Steeper	46 U. C. R. 87	630
Croyden Commercial Gas Co. v. Dickinson	1 C. P. D. 707 ; 2 C. P. D. 46	695
Cubitt v. Porter	8 B. & C. 257	554
Cud v. Ruther	1 P. Wms. 569	79
Culverwell v. Lockington	24 C. P. 611	554
Cupit v. Jackson	13 Price 721	257
Curtis v. Wheeler	Moo. & M. 493	444
Cutbush v. Cutbush	1 Beav. 184	540
Cuthbert v. Commercial Travellers' Ass'n	39 U. C. R. 578	710, 719

D.

Dalby v. India and London Life Ass. Co.	15 C. B. 365	618
Dann v. Spurrier	7 Ves. 235	10
Darby v. Darby	3 Drew. 495	226, 235
Darling v. Hudson	17 Beav. 248	414
Davidson v. Ross	24 Gr. 83	642
Davies v. Games	12 Ch. D. 813	226
Davies v. Mann	10 M. & W. 546, 12 L. J. Ex. 10, 6 Jur. 954	615
Davies v. Jones and Evans	24 Ch. D. 190	198, 413
Davis v. Hawke	4 Gr. 394	782
Davis v. Wrislow Manufacturing Co.	51 Maine 264	34
Davison, <i>In re</i> J. & H., <i>Ex p.</i> Chandler.	13 Q. B. D. 50	578
Dawkins v. Autobus	17 Ch. D. 615	710, 715, 717, 735
Dawson v. Graham	41 U. C. R. 422	141, 142
Dawson v. Whitehaven	6 Ch. D. 218	226

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Deal v. Potter.....	26 U. C. R. 578.....	629, 630, 632, 633
DeMederia v. Grove	10 Q. B. 152	342
Dennison v. Goehring	7 Barr. (Penn.) 178.....	395
Denny v. Montreal Telegraph Co.	42 U. C. R. 577.....	456
De Tastet v. LeTavernier.....	1 Ke. 161	711
Devanney v. Brownlee	8 A. R. 355.....	695, 696, 698, 700, 704
Devanney v. Dorr	4 O. R. 206	86
Devayne v. Robinson	24 Beav. 86.....	541
Dewe v. Waterbury	6 S. C. 143	578
Dickenson v. Teasdale	1 DeG. J. & Sm. 52	197
Dickson v. Reuter's Telegraph Co.	2 C. P. D. 60	84
Dillon v. Coppin.....	4 My. & C. 647	205
Dobie v. Temporalities Board	7 App. Cas. 136	184
Doe d. Bell v. Beaumer	3 O. S. 243	561
Doe d. Darlington v. Bond	5 B. & C. 555	86
Doe v. Hughes	6 Ex. 223	413
Doe d. Matthewson v. Wrightman	4 Esp. 5	86
Doe d. McGillis v. McDonald	1 U. C. R. 432	149, 159
Doe d. Rees v. Williams	2 M. & W. 749	195
Doe d. Stata v. Smith	9 U. C. R. 658	149
Doe Exd. Bradt v. Hodgkins	2 U. C. Jur. O. S. 213	148
Doe Exd. McDonald v. Twigg.....	5 U. C. R. 167	148
Dolphin v. Leyton	4 C. P. D. 130	740
Dominion Bank v. Blair	30 C. P. 591	307
Dow v. Black	6 F. C. 272	184
Dowell v. General Steam Navigation Co.	5 E. & B. 195	610, 614
Drake v. Preston	34 U. C. R. 65	360
Drake v. Wigle	24 C. P. 408	371
Dubois v. Keate	11 A. & E. 329	311
Duchess of Kingston's Case	11 Sm. L. C. 8th ed. 784	342
Duckworth v. Ewart	2 H. & C. 129	404
Duddy v. Gresham	39 L. T. N. S. 48	490
Duff v. Canada Mutual Fire Ins. Co ...	9 P. R. 292	143
Duke of Beaufort v. Patrick	17 Beav. 60	10, 18
Duke of Devonshire v. Eglin	14 Beav. 530	10, 17
Dunlop v. Higgins	1 H. L. Cas. 381	435
Dwinel v. Barnard	28 Maine 554	34
Dwinel v. Veazie	44 Maine 167	34

E.

Earl of Beauchamp v. Winn	L. R. 6, H. L. 234.....	308
Eastern Counties R. W. Co. v. Brown ..	6 Ex. 314	68
East Zorra, Township of v. Douglas ..	17 Gr. 462	271
Eden v. Smyth	5 Ves. 3:0	517
Edwards v. Brown	1 C. & J. 307	306
Edwards v. Midland R. W. Co	6 Q. B. D. 287	68
Edy v. Strafford	1 Tyr. 295	40
Eland v. Eland	4 M. & Cr. 420	540
Elliott v. Merryman	W. & T. L. C. 5th ed., vol. 1, p. 64 ..	541
Elliott v. McConnell	21 Gr. 276	90, 473, 497
Ellis v. Abell	10 A. R. 226	133
Ellis v. Lewis	3 Ha. 310	373
Ellis v. Loftus Iron Co	L. R. 10 C. P. 10	586
Ellison v. Ellison	1 W. & T. L. C., 5th ed., 273 ..	329, 335
Elton v. Curteis	19 Ch. D. 49	287, 288, 290
Engel v. Fitch	L. R. 3 Q. B. 314, 4 Q. B. 659	39, 40, 46, "51
English v. English	12 Gr. 441	541

NAME OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Erbs v. Western R. W. Co.	5 S. C. R. 179	545
Errington v. Dumble	8 C. P. 65	561
Essery v. Court Pride	2 O. R. 596	710
Evans v. Richardson	3 Mer. 470	503
Evans v. Wood	5 Eq. 9	95
Everett v. London Assurance Co.	19 C. B. N. S. 126	342, 346, 349
Ewart v. Gordon	13 Gr. 40	548
Ewart v. Steven	16 Gr. 193, 18 Gr. 35	541

F.

Farmer v. Hamilton Tribune Printing Co	3 O. R. 538	56, 57
Farquhar v. City of Toronto	12 Gr. 186	257
Fellowes v. Lord Gwydyr	1 Sim. 63	316
Ferrand v. Bradford	21 Beav. 412	60
Ferrand v. Wilson	4 Ha. 385	556
Ferrier v. Cole	15 U. C. R. 561	629
Ferry v. Laible	31 N. J. Eq. 566	546
Field v. Court Hope of the Ancient Order of Foresters	26 Gr. 467	710, 712, 715, 717
Fillingham v. Bromley	1 Turn. & Russ. 530	491
Finch v. Underwood	2 Ch. D. 310	11
Firth v. Dowling Iron Co	3 C. P. D. 254	593
Fisher v. Kean	11 Ch. D. 35	712, 735
Fitzgerald v. Fitzgerald	20 Gr. 410	339
Fitzgerald v. Grand Trunk R. W. Co	27 C. P. 528	133
Fleming v. Duncan	17 Gr. 76	752
Fleming v. McNab	8 A. R. 656	559
Fletcher v. Manning	12 M. & W. 571	670
Fletcher v. Rylands	L. R. 3, H. L. 330	586
Fletcher v. Tayleur	17 C. B. 21	403
Flight v. Booth	1 Bing. N. C. 370	307
Flint v. Woodin	9 Ha. 618	316
Flockton v. Bunning	8 Ch. 323n	240
Flower v. Lloyd	10 Ch. D. 334	342
Foakes v. Deer	9 App. Cas. 664	137
Foley v. Canada Permanent Loan and Savings Co.	4 O. R. 38	124
Folger v. Hinckley	5 Cush. (Mass.) 263	629, 632
Folger v. Minton	10 U. C. R. 425	629
Foot v. Bullock	4 U. C. R. 480	110
Forbes v. Peacock	1 Ph. 717	545
Foss v. Harbottle	2 Ha. 461	712
Foster v. Beall	15 Gr. 244	148
Foster v. Dawber	6 Ex. 839	132
Foster v. Miller	5 U. C. R. 505	628
Foster v. McKinon	L. R. 4 C. P. 704	306
Foster v. Peacock	18 M. & W. 630	416
Fox v. Toronto and Nipissing R. W. Co.	26 Gr. 352	257
Frazee v. McFarland	43 U. C. R. 281	381
Fraser v. Hopkins	2 Taunt 5	84
Fraser v. Marsh	13 East. 238	84
Frecooe v. May	2 F. & F. 124	578
Frontenac, County of v. Kingston	30 U. C. R. 584, 271, 276, 281, 283, 284	
Furness v. Mitchell	3 A. R. 510	381, 387, 388, 538
Fyfe's Case	L. R. 4 Ch. 769	419

G.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Gairdner v. Gairdner.....	1 O. R. 184	532, 535
Gallagher v. Humphreys	10 W. R. 664	356, 459
Galloway v. Bird	12 Moo. 547	628
Galton v. Ennis	1 Col. 243	71
Gantret v. Egerton.....	L. R. 2 C. P. 371	456
Gardner v. Barber	18 Jur. 508	177, 179
Gardner v. Freemantle.....	19 W. R. 256	711
Garland, Ex parte	10 Ves. 110	540
Garson v. Garson	3 O. R. 439	339
Gedge v. Trail	1 R. & M. 281 n., 238, 240, 250, 251	252
George v. Chambers	11 M. & W. 160	630
Georgian Bay Lumber Co. v. Thompson	35 U. C. R. 64	124
Gibbs v. Guild	9 Q. B. D. 591	199
Gibson v. Gibson	1 Drew. 42	373
Gibeon v. United Counties of Huron and Bruce	20 U. C. R. 111	185, 203
Gilchrist v. Conger	11 U. C. R. 197	630
Gilchrist and Township of Sullivan, Re	44 U. C. R. 588	217
Giles v. O'Toole	4 Barb. 281	48
Gilliatly v. White	18 Gr. 4	324
Gilleland v. Wadsworth	1 A. R. 82	497
Gioins v. Darvill	27 Gr. 507	536
Godolphin v. Tudor	1 Salk. 468	110
Godwin v. Francis	L. R. 5 C. P. 295	39, 41, 46
Gener v. Wobl	26 Minn. 154	630
Goff v. Lister	14 Gr. 451	90
Golds v. Kerr	W. N. 84, p. 46	371
Goodsall v. Boldero	9 East 72	618
Gordon v. Waterous	36 U. C. R. 321	133
Gosbell v. Archer	2 A. & El. 500	513
Gosling v. Carter	1 Coll. C. C. 644	414
Graham v. Chalmers	9 Gr. 239	473
Graham v. Crozier	44 U. C. R. 378	578
Grand Junction R. W. Co. v. Peterborough, Re	6 A. R. 339, 8 S. C. 76	184, 205, 218
Graves v. Graves	8 Sim. 56	414
Gray v. Carleton	35 Maine 481	483
Great Western R. W. Co. v. Davies	39 L. T. N. S. 475	586, 589, 596
Green v. Elmslie	1 Peake's N. P. 278	462
Green v. Williams	45 Ill. 206	48
Greenstreet v. Paris	21 Gr. 229	91
Greville v. Atkins	9 B. & C. 462	110
Greville v. Browne	7 H. L. C. 689	412, 414
Grier v. Plunket	15 Gr. 152	271
Grierson v. County of Ontario	9 U. C. R. 623	185, 217
Griffith, Ex parte	23 Ch. D. 69	506, 646
Griffith v. Tempest	2 C. P. D. 320	359
Grummet v. Grummet	14 Gr. 648	197
Gummoe v. Howes	23 Beav. 184	679
Gundry v. Pinniger	1 DeG. M. & G. 502	374
Gunn v. Roberts	L. R. 9 C. P. 331	84
Gwynne v. Rees	2 P. R. 290	642

H.

Hadley v. Baxendale	9 Ex. 341	45, 46, 48, 51
Haisley, Re	44 U. C. R. 345	754

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Haldenby v. Spofforth	1 Beav. 390	546
Hall v. Hill	22 U. C. R. 578, 2 E. & A. 569	561
Hall v. Hill	1 Dru. & W. 94	373
Hall v. White	106 Mass. 599	629
Hall, Ex p.	19 Ch. D. 580	506, 643, 646
Hall, Ex p., In re Whiting	10 Ch. D. 615	754
Hallahan v. Herbert	11 Abb. P. R. N. S. 326	483
Hall Manufacturing Co. v. American R. W. Supply Co.	48 Mich. 331	125
Hamilton v. Bankin	15 Jur. 70	488
Hamilton v. Harrison	46 U. C. R. 124	21, 23
Hamilton v. McKellar, Re lot 27, etc.	26 Gr. 110	491
Hamilton and Port Dover R. W. Co. v. The Gore Bank	20 Gr. 190	497
Hamilton, School Trustees of Township of v. Neil	28 Gr. 408	271
Hamley v. Gilbert	Jac. 361	180
Hampton v. Holman	5 Ch. D. 187	557
Hamsell v. Smyth	7 C. B. N. S. 731	456
Harding v. Townsend	43 Verm. 536	606
Harling v. Township of Cardiff	2 O. R. 329	193
Hare v. Horton	5 B. & Ad. 715	346
Harris v. Commercial Bank	16 U. C. R. 431	21, 22
Harris, Re	7 Ex. 344	686
Harrison v. Brega	20 U. C. R. 324	473
Harrison v. Pearce	1 F. & F. 567	578
Harshman v. Bates County	3 ib. 150	186
Harvey v. Shelton	7 Beav. 462	486
Harwich v. The Erie R. W. Co	Blake, V.C., Oct. 3rd, 1877, Not reported	212, 220
Harwood v. Bartlett	6 B. N. C. 61	648
Hawford v. Great Northern R. W. Co.	11 H. L. C. 683	522
Hastings Union v. Guardians of St. James, Clerkenwall	L. R. 1 Q. B. 38	444
Hateley v. Merchants Despatch Co.	4 O. R. 723	240
Hawkin's Case	2 K. & J. 253	567
Hayes v. Feasenden	106 Mass. 228	483
Hayle v. Hayle	3 O. S. 296	310
Haynes v. Copeland	18 C. P. 168	203, 271
Haynes v. Smith	11 U. C. R. 67	404
Heard v. Pilley	4 Ch. 548	72
Heffield v. Meadows	L. R. 4 C. P. 595	405
Helder, Ex parte, In re Lewis	24 Ch. D. 33	642
Helm v. Corporation of Town of Port Hope	22 Gr. 273	684
Hemp v. Garland	4 Q. B. 519	129
Henderson v. Sills	8 C. P. 71	629
Henry v. Mayor and Burgesses of Lyme Regis	5 Bing. 91; 3 B. & Ad. 877; 1 Bing. N. C. 222	34
Hennessy, Re	2 Dr. & W. 555	473
Henry v. Burness	8 Gr. 345	71
Henry v. Simpson	19 Gr. 522	197
Hepburn v. Parke	6 O. R. 472	642
Hepburn v. Patton	26 Gr. 597	643
Heritage's Case	L. R. 9, Eq. 5	419
Herrick v. Franklin	6 Eq. 593	373
Hersee v. White	29 U. C. R. 232	710
Hervey v. Smith	22 Beav. 299	10, 18, 554
Hessin v. Coppin	21 Gr. 253	522

NAMES OF CASES CITED.	WHERE REPORTED	Page of Vol.
Hewison v. Corporation of Pembroke	6 O. R. 170	100
Hicks v. New Port, &c., R. W. Co.	4 B. & S. 403	605
Higgins v. Senior	8 M. & W. 834	72, 317
Hill, Ex p.	23 Ch. D. 695	506
Hilliard v. Eiffe	L. R. 7, H. L. 39	252
Hilton v. Merrill	106 Mass. 528	483
Hirschfield v. London, etc., R. W. Co.	2 Q. B. D. 1	307
Hoadley v. McLaine	10 Bing. 482	73
Hobbs v. Midland R. W. Co.	20 Ch. D. 418	500
Hobson v. Bass	L. R. 6 Ch. 792	406
Hodgson v. Johnson	E. B. & E. 685	112
Holden v. Robinson	65 Maine 215	34
Holdich v. Holdich	2 Y. & C. 18	373
Holford v. Yate	1 K. & J. 677	288
Holland v. Baltimore	11 Md. 186	684
Holland v. Hodgson	L. R. 7 C. P. 328	22
Holliday v. Ontario Farmers' Mutual &c. Co	33 U. C. R. 558	63
Holmes v. Penny	3 K. & J. 90	507
Hooker v. Gamble	12 C. P. 512	695
Hopkins v. Hopkins	3 O. R. 223	754
Hopkins v. Mayor of Swansea	4 M. & W. 640	205
Hopkins v. Prescott	4 C. B. 578	110
Hopkinson v. Forster	L. R. 19 Eq. 76	669
Hopkinson v. Marquis of Exeter	L. R. 5 Eq. 63	710, 715, 717
Horne v. Midland R. W. Co	L. R. 7 C. P. 591, 8 C. P. 131	47, 50
Horton, In re	8 Q. B. D. 434	408
Hostrawser v. Robinson	23 C. P. 530	140, 142, 143
Household Fire &c. Ins. Co. v. Grant	4 Ex. D. 218	434
Howard Fire Ins. Co. v. Norwich and N. Y. Transportation Co	12 Well. 194	356
Howe v. Ward	4 Maine 195	643
Howell v. Metropolitan District R. W. Co.	19 Ch. D. 508	740
Hower v. Lloyd	10 Ch. D. 334	342
Hughes v. Macfie	2 H. & C. 744	588
Hughes v. Statham	6 D. & R. 219, 4 B. & C. 187	110
Huguenin v. Basely	2 Wh. & T. L. C. 547	239
Humphries v. Cousins	2 C. P. D. 239	586
Hunt v. Algar	6 C. & P. 245	578
Hunt v. Bateman	10 Ir. Eq. 360	197
Hutchinson v. Collier	27 C. P. 249	560, 562, 563
Hutchinson v. Sargent	16 Gr. 78	373
Hutton v. London and S. W. R. W. Co.	7 Ha. 259	60
Hyde v. Gooderham	6 C. P. 21	401, 404

I.

Ilridge v. Goodwin	5 C. & P. 190	462
Inderwick v. Snell	4 McN. & G. 216	710, 715, 717
Inglis v. Butterly	3 App. Cas. 562	129
Ingram v. Taylor	7 A. R. 216	538
Innisfallen, The	L. R. 1 A. & E. 72	84
Irwin v. Young	28 Gr. 511	238, 240

J.

Jackson, Ex parte	14 Ch. D. 725	445
Jackson v. Taruley	1 Drew. 617	557

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Jacques v. Millar	6 Ch. 153	39, 40, 43, 47
James v. Balfour	7 A. R. 461	84
Jameson v. Kerr	6 P. R. 3	630
Jarvin v. Great Western R. W. Co.	8 U. C. R. 280	110
Jeffreys v. Jeffreys	1 Cr. & Ph. 138	205
Jenkins v. Morris	14 Ch. D. 614	169
Johnson v. Garlick	25 Wia. 705	629
Johnson, In re, Shearman v. Robinson	15 Ch. D. 548	541
Johnston v. Boyle	8 U. C. R. 142	457
Johnston v. Northern R. W. Co.	34 U. C. R. 432	605
Joint Stock Discount Co., Sichell's Case, Re	L. R. 3 Ch. 119	94
Jones v. Earl of Suffolk	1 Bro. C. C. 527	491
Jones v. Stansted, &c., R. W. Co.	L. R. 4, P. C. 98	61
Jordan v. Adams	9 C. B. N. S. 483	679
Jordan v. Monev	5 H. L. C. 185	205
Joseph Neale, Re	3 DeG. F. & J. 645	226, 233
Judd v. Green	33 L. T. 597	90
Judd v. Green	34 L. T. N. S. 600	498

K.

Kenig v. Ritchie	3 F. & F. 413	57
Keith v. Burrows	1 C. P. D. 722 ; 2 App. Cas. 636	84
Keith v. Fenelon Falls Union School Section	3 O. R. 194	278
Kekewich v. Manning	1 DeG. M. & G. 187	395
Kellogg v. Hyatt	1 U. C. R. 445	124
Kelly v. Cowan	18 U. C. R. 112	359
Kelly v. Lord Bellow	4 Bro. P. C. 495	287
Kelner v. Baxter	L. R. 2 C. P. 174	569
Kendall v. Hamilton	L. R. 4 App. Cas. 504	578, 579
Kennedy v. Township of Sandwich	9 U. C. R. 326	271
Kenrick v. Beauclerk	3 B. & P. 175	416
Kerr v. Read	23 Gr. 325	518
Kerr v. Strip	40 U. C. R. 125	381
Kessock v. Jarvis	6 C. P. 393	23
Kilvington v. Gray	10 Sim. 293	179
King v. Carpenter	6 A. & E. 794	203, 271
King v. Hoare	13 M. & W. 494	579, 581
King v. Waddington	1 East 155	597
Kirk v. Nowill	1 T. R. 118	184
Kitchen v. Anderson	3 Wils. 308	579
Kitchen v. Campbell	3 Wils. 304	578
Kitchen v. Hicks	6 O. R. 739	506, 507
Knapp v. Brown	45 N. Y. 207	483
Kneesha v. Collier	30 C. P. 265	310
Knox v. Gye	L. R. 5, H. L. 656	239

L.

Labourchere v. Wharncliffe	13 Ch. D. 346	712, 735
Laird v. The Birkenhead R. W. Co	Johns. 500, 6 Jur. N. S. 140	19
Lake Superior Navigation Co. v. Morrison	22 C. P. 217	567
Lambe v. Oxton	1 Dr. & S. 125	329, 335
Lamert v. Heath	15 M. & W. 486	125
Lander v. Hawkins	2 M. & K. 243	371
Landreville v. Gouin	6 O. R. 462	588
Lane v. Jackson	20 Beav. 535	90

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Langdale v. Briggs.....	8 DeG. M. & G. 427	556
Langdon, etc., R. W. Co., Re.....	45 U. C. R. 47	185
Langton v. Wait.....	6 Eq. 165, 4 Ch. 402	79
Lapp v. Lapp	16 Gr. 159	373
Larios v. Gurety	L. R. 5 P. C. 346	404
Lawrence and Corporation of Thurlow, Re	33 U. C. R. 223	100
Lawson v. Laidlaw.....	3 A. R. 77	381
Laxton v. Pratt	2 Camp. 185	695
Leaming v. Woon	7 A. R. 42	257
LeCroy v. Easton	10 Mod. 499	79
Lee v. Riley.....	18 C. B. N. S. 722	586
Lee v. Sankey.....	15 Eq. 204	16
Lehmann v. McArthur	L. R. 3 Ch. 496	11
Leighton v. Medley	1 O. R. 207	86
Lewis v. Jones.....	4 B. & C. 506	305
Lewis v. Teal et al.....	32 U. C. R. 108	630, 633
Lightbound v. Warnock	4 O. R. 196	73
Lippard v. Ricketts	41 L. J. N. S. Ch. 595	291
Lister v. Lobley	7 A. & E. 124	60
Little v. Billings.....	27 Gr. 353	678
Livingstone v. Acre	15 Gr. 610	196
Lloyd and Township of Elderlie, Re.....	44 U. C. R. 235, 185, 203, 205, 216, 217	
Locke v. Furze	17 C. B. N. S. 96	40, 48
Logie v. Young	10 Gr. 217	71
London &c. Bank—Ward & Henry's Case, Re	L. R. 2 Ch. 431	94
London, Huron, and Bruce, and Township of East Wawancosh, Re	36 U. C. R. 93	203
London and Westminster Loan and Dis- count Co. v. Drake.....	6 C. B. N. S. 798	469
Long v. Hancock.....	7 O. R. 154	643, 645
Longeway v. Mitchell	17 Gr. 190	643
Longmore v. Elmur	2 Y. & C. C. C. 363	180
Loosemore v. The Tiverton &c. R. W. Co.	9 App. Cas. 480, 50 L. T. N. S. 648,	220
Losh v. Hague	1 Webs. Pat. C. 202	363
Lovell v. Gibson.....	19 Gr. 280	541
Lucas v. Township of Moore	43 U. C. R. 334; 3 A. R. 602	586
Luke v. South Kensington Hotel Co	11 Ch. D. 121	428
Lundy v. Kerr	7 C. P. 371	125
Luther v. Wood	19 Gr. 348	184, 203, 218, 219
Lutterall v. Reynell	1 Mod. 283	310
Lyttleton v. Blackburn.....	33 L. T., N. S. 641	711

M.

Macdonald v. Richardson.....	1 Giff. 81	240
Macdougall v. Peterson.....	40 U. C. R. 95	630
Macklem v. Cummings	7 Gr. 318	554
Macnamara v. McLay	8 A. R. 319	473
Maitland v. Goldney	2 East 426	582
Malcolm v. Hunter.....	6 O. R. 102	556
Manchester and Milford R. W. Co., Re	14 Ch. D. 645	257, 268
Manchester, etc., R. W. Co. v. Wallis	14 C. B. 213	586
Mangan v. Atterton	L. R. 1, Ex. 239	586, 588
Mann v. Nunn.....	43 L. J., N. S., C. P. 24	133
Manndrell v. Manndrell	10 Ves. 246	490
Manson v. Gurnett.....	2 P. R. 389	630
Marble v. City of Worcester	4 Gray 395	456

NAME OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Markham v. Great Western R. W. Co.	25 U. C. R. 572	586 599
Marriott v. Hampton	11 Sm. L. C.R., 8th ed., 421	342
Marsh v. Fulton Co.	10 Wall. 676	184
Marsh v. Huron College	27 Gr. 605	711
Martin v. Kennedy	2 B. & P. 69	578, 582
Martindale v. Clarkson	6 A. R. 1	220, 229
Marzette v. Williams	1 B. & Ad. 415	404
Mason v. Pritchard	12 East. 227	405
Mason v. Scott	22 Gr. 592	115, 117
Massingberd v. Montague	9 Gr. 92	71
Matta v. Hawkins	5 Taunt. 20	554
Manison v. Commercial Bank	17 U. C. R. 17	22
Mayer v. Isaac	6 M. & W. 605	405
Maybank v. Brooks	1 B. C. C. 84	340
Mayor, etc., of Montreal v. Drummond	1 App. Cas. 384	60
Melhado v. The Porte Alegre, etc., R. W. Co.	L. R. 9 C. P. 503	569
Meller v. Watkins	L. R. 9 Q. B. 400	112
Mennie v. Blake	2 Jur. N. S. 953	628
Mercer and Moore, In re	14 Ch. D. 296	536
Meriden Silver Co. v. Lee	2 O. R. 451	506, 507, 710
Merle v. Wells	2 Camp. 413	406
Messeeena v. Carr	9 Eq. 260	16, 17
Metcalt v. Reid	9 U. C. R. 263	360
Metropolitan Bank v. Jones, In re	3 Ch. D. 366	419
Mexican and South American Co.—Shewell's Case, Re.	L. R. 2 Ch. 387	95
Miali v. Brain	4 Mad. 124	379
Michie v. City of Toronto	11 C. P. 379	184, 211, 216
Midland Great Western R. W. Co. v. Johnson	6 H. L. Cas. 810	306
Midland Ins. Co. v. Smith	6 Q. B. D. 561	310
Miller v. Bridgeport Gas Co.	21 U. S. Off. Gaz. 201, 104 U. S. R. 350	367
Miller v. Leather	1 E. & B. 619	630
Miller v. Miller	17 C. P. 229	629, 227
Miller v. Reid	29 C. P. 576, S. C. 4, A. R. 479	669
Miller v. Solomons	7 Ex. 560	438
Mills v. Cottle	17 Gr. 335	541
Mirehouse v. Scaife	2 M. & Cr. 695	414
Misener and Township of Banffleet, Re.	46 U. C. R. 457	205
Mitchell v. Roberts	50 N. H. 486	629
Mitcheson v. Oliver	25 L. J. N. S. Q. B. 39	84
Moison v. Great Western R. W. Co.	14 U. C. R. 102	606
Molsons Bank v. Girdlestone	44 U. C. R. 54	303, 308
Moore v. Kay	5 A. R. 261	40
Morgan v. Lailey	33 U. C. R. 369	112
Morgan v. Griffith	L. R. 6, Ex. 70	112, 183
Morgan, In re, Pillgrem v. Pellgrem	18 Ch. D. 93	540
Morgan v. Queanal	26 U. C. R. 539	559
Morgan's Assignees v. Shinn	15 Wall. 105	84
Morison v. Moat	9 Ha. 241	522
Morrell and City of Toronto, Re.	22 C. P. 328	684
Morris v. Jeffries	1 Q. B. D. 261	634
Morrison v. General Steam Navigation Co	8 Exch. 733	610
Morrison v. Earls	5 O. R. 434	140
Morton v. St. Thomas, In re	6 A. R. 323	456, 458, 684, 686
Moreley v. Hanford	10 B. & C. 729	129
Moss v. James	38 L. T., N. S. 595	471

NAME OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Mozley v. Alston	1 Phill. 790	712
Muir v. Dunnet	11 Gr. 87	498
Mulliner v. Midland R. W. Co	11 Ch. D. 611	500, 501
Munro v. Grey	12 U. C. R. 647	561
Murphy v. Halpin	8 Ir. C. L. R. 127	57
Murphy v. Murphy	20 Gr. 575	373, 379
Murray, Re—Purdham v. Murray	9 A. R. 369	718

Mc.

McArthur v. McArthur	14 U. C. R. 544	473
McArthur and Southwold, Re	3 A. R. 295	61
McCann v. Waterloo Mutual Fire Ins. Co.	34 U. C. R. 376	419, 433
McClung v. McCracken	3 O. R. 596	72, 325
McClure v. Colclough	17 Al. 89	359
McCollum v. Davis	8 U. C. R. 150	404
McConaghay v. Denmark	S. C. R. 609	473
McCormick v. McRae	11 U. C. R. 187	392
McCracken v. City of San Francisco	16 Cal. 591	271
McCrae v. White	9 S. C. R. 22	507
McDonald v. Lane	7 S. C. R. 462	79
McDonald v. McCall	21 Gr. 342	506
McDonell v. McDonell	21 Gr. 342	381
McDougall v. Campbell	6 S. C. R. 502	90, 497
McDowell v. Great Western R. W. Co.	6 C. P. 180	606
McFarlane v. Gilmour	5 O. R. 302	456
McGahey v. Alston	2 M. & W. 206	419
McGuire v. Hudson River R. W. Co.	2 Daly 76	616
McIlroy v. Hawke	5 Gr. 516	752
McKay v. Chrysler	3 S. C. R. 436	148
McKellar v. McFarland	1 C. P. 451	631
McKellar v. Prangley	25 Gr. 545	541
McLaren v. Buck	26 C. P. 539	34
McLaren v. Caldwell	6 A. R. 456; 9 App.Cas. 392, 33, 34, 37	
McLean v. Great Western R. W. Co.	33 U. C. R. 198	500
McLellan v. Brown	12 C. P. 542	359, 360, 361
McLennan v. Grant	15 Gr. 65	373
McMahon v. Field	7 Q. B. D. 591	39
McMaster v. Hector	8 C. L. J. N. S. 284	290
McMurray v. Spicer	5 Eq. 527	73
McNaughton v. Webster	6 U. C. L. J. 17	643, 740
McNeillie v. Acton	4 DeG. M. & G. 744	540, 544
McRae v. White	9 S. C. 22	643

N.

Nanney v. Williams	22 Beav. 457	752
Nant-y-Glo Blaine Iron Works Co. v. Tamplin	35 L. T. N. S. 121	90, 498
Napanee, Board of Education of, v. Town of Napanee	28 Gr. 395	271
Nasmith v. Manning	5 A. R. 126; 5 S. C. 417	94, 419, 567
National Ins. Co. v. Egleson	28 Gr. 406	567
National Provincial Bank v. Harle	6 Q. B. D. 630	144
Nelles v. Paul	4 A. R. 1	506, 670
Nelthorpe v. Holgate	1 Coll. 203	317
Nene Valley Drainage Commissioners v. Dunkley	4 Ch. D. 1	72

NAME OF CASES CITED.	WHERE REPORTED.	Page of Vol.
New Brunswick & Canada R. & Land Co. (Limited) v. Muggeridge	4 H. & N. 160	419
Newland v. Champion	1 Ves. Sen. 104	238, 250
Newton v. Sherry	1 C. P. D. 246	392
Nicholls v. Great Western R. W. Co ..	27 U. C. R. 282	606
Nichol v. Township of Alnwick, Re ..	40 U. C. R. 577	205, 216
Nolan v. Donnelly	4 O. R. 440	22, 507
North London R. W. Co. v. Great Western R. W. Co	11 Q. B. D. 30	185
North London R. W. Co. v. St. Mary's Vestry, Islington	21 W. R. 226	457
North Simcoe R. W. Co. v. Toronto, Re ..	36 U. C. R. 101	184, 205
Norwich and New York Transportation Co. v. Western Mass. Ins. Co ..	34 Conn. 561	356
Nourse v. Prim	4 Johns. Ch. 490	79
Nowlan v. Logie	7 Gr. 88	540

O.

Oakeley v. Pasheller	10 Bli. N. R. 548	703
Oakes v. Smith	17 Gr. 660	752
O'Brien v. Ficht	18 U. C. R. 241	124, 125
Odger v. Mortimer	28 L. T., N. S. 426	57
O'Doherty v. Ontario Bank	32 C. P. 285	381
O'Donohoe v. Wilson	42 U. C. R. 335	507
Ogden v. McArthur	36 U. C. R. 246	381
Ogle v. Corthorn	9 Jur. 326	377
O'Hara v. Chaine	1 J. & Sat. 662	373
Olmstead v. Burke	25 Ill. 86	49
Olmstead v. Smith	15 U. C. R. 421	21, 22
Omnium Securities Co. v. Richardson ..	7 O. R. 182	381
Ontario Industrial Loan, etc., Co. v. Lindsay	3 O. R. 66	473
O'Reilly v. Allan	11 U. C. R. 411	359
Osborne v. Rowlett	13 Ch. D. 798	536
Otter v. Lord Vaux	2 K. & J. 650; 6 DeG. M. & G. 638 ..	91
Oxley v. James	13 M. & W. 209	444

P.

Pafford & County of Lincoln v. Lincoln ..	24 U. C. R. 16	185, 203, 211
Page v. Cooper	16 Beav. 396	546
Palmer v. Bate	2 B. & B. 673; 6 Moore 28	108, 110
Palmer v. Graves	1 Keen 545	540
Palmer v. Johnson	13 Q. B. D. 351	124
Pardee v. Lloyd	5 A. R. 1	224
Parker v. Clark	30 Beav. 54	496
Parkes v. Stephens	L. R. 8 Eq. 358; 5 Ch. 36	522
Parkes v. St. George	2 O. R. 342; 10 A. R. 496	506, 643
Parnell v. Great Western R. W. Co.	4 C. P. 517	606, 612, 613
Parton v. Crofts	16 C. P. N. S. 11	316
Patterson v. Gas Light and Coke Co.	2 Ch. D. 812	522
Peace v. Hains	11 Ha. 151	518
Pearse v. Morrice	2 A. & E. 96	212
Pearl v. Great Western R. W. Co ..	10 A. R. 191	606
Peck and Town of Galt, Re	46 U. C. R. 211	686
Penn v. Bibby	L. R. 2 Ch. 127	522

NAME OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Pennell v. Reynolds	11 C. B. N. S. 722	648
Peterkin v. McFarlane	6 A. R. 254	91
Peto v. Welland R. W. Co	9 Gr. 455	257
Pew v. Lefferty	16 Gr. 408	490, 491, 492
Phoenix Mutual Life Ins. Co. v. Barreau.	67 N. Y. 354	567
Pickard v. Seers	6 A. & E. 469	112
Pike v. Eyre	9 B. & C. 909	444
Pilkington v. Hastings	2 Cro. Eliz. 813	629
Pleminer v. Mayor of Wellington	9 App. Cas.	11
Plimpton v. Malcolmson	3 Ch. D. 557	522
Polak v. Everett	1 Q. B. D. 669	271
Pooley v. Harradine	7 E. & B. 431	695, 703
Potter v. Duffield	18 Eq. 4	73
Potts v. Corporation of Dunnville	38 U. C. R. 96	185, 271
Potta v. Village of Dumble	38 U. C. R. 96	205
Powell v. Hellicar	26 Beav. 261	518, 520
Powell v. Thomas	6 Ha. 300	10
Prehn v. Royal Bank of Liverpool	L. R. 5 Ex. 92	404, 406
Pride v. Fooks	2 Beav. 430	179
Prince v. Corporation of Toronto	25 U. C. R. 175	100
Pringle v. McDonald	10 U. C. R. 280	110
Pronguey v. Gurney	37 U. C. R. 347	469
Pugh v. Arten	L. R. 8 Eq. 626	469
Pullman Palace Car Co. v. Gardner	Alb. L. J. (1884) 8, 9	173
Pullman Palace Car Co. v. Smith	24 Am. R. 258	174
Purdy v. Farley	10 U. C. R. 545	100
Pybus v. Mitford	2 Lev. 77	389
Pym v. Great Northern R. W. Co	2 B. & S. 759, 4 B. & S. 396.. 605, 420, 622, 623	

Q.

Queen v. Churchwardens of St. Michaels	6 E & B. 807	203
Queen, The v. Sparham & Greaves	25 C. P. 143	571

R.

Radley v. London & North Western R. W. Co.	L. R. 1, App. Cas. 754	614
Ramsden v. Dyson	L. R. 1, H. L. 140	10, 19
Randell v. Garvey	10 Abb. P. R. 179	483
Rankin v. Great Western R. W. Co....	4 C. P. 463	500
Rashdall v. Ford	2 Eq. 750	308
Redgrave v. Hurd	20 Ch. D. 1	303, 307
Reese River Silver Mining Co. v. Atwell	L. R. 7, Eq. 347	643
Reese River Silver Mining Co. v. Smith	L. R. 4, H. L. 64	307
Reid v. Smith	2 O. R. 74	74
Regina v. Abbott	1 Den. C. C. 273	662
Regina v. Ardley	12 Cox 23	662
Regina v. Bennett	1 O. R. 445	654, 655
Regina v. Boulton	15 U. C. R. 272	457
Regina v. Burney	31 L. T. N. S. 828	457
Regina v. Carlisle	Dearaley's C. C. 337	662
Regina v. Carawell	33 U. C. R. 303	575
Regina v. Charrette	13 Q. B. 447	109
Regina v. College of Physicians, etc. of Ontario, In re McConnell	44 U. C. R. 146	573
Regina v. Darlington Free Grammar School	12 L. J. N. S. Q. B. 124; 14 L. J. N. S. Q. B. 67 , 6 Q. B. 682.. 710, 715, 717	

NAME OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Regina v. Foster	13 Cox C. C. 394	662
Regina v. Frawley	45 U. C. R. 227	575
Regina v. Gemmel	26 U. C. R. 312	654
Regina v. Goldsmith	L. R. 2 C. C. 74	653
Regina v. Great Western R. W. Co	32 U. C. R. 506	100
Renaud v. Great Western R. W. Co	12 U. C. R. 408	612, 613
Regina v. Hodge	9 App. Cas. 107	477
Regina v. Howarth	33 U. C. R. 537	660
Regina v. Hunt	16 C. P. 145	100
Regina v. Justices of Middlesex	2 Q. B. D. 516	661
Regina v. Kenrick	5 Q. B. 49	662
Regina v. Mason	22 C. P. 246	652
Regina v. Meakin	11 Cox. C. C. 270	662
Regina v. Mercer	17 U. C. R. 602	109
Regina v. Mills	17 C. P. 654	34
Regina v. Moodie	20 U. C. R. 889	109
Regina v. Osler	32 U. C. R. 324	573
Regina v. Phillimore	51 L. T. N. S. 205	661
Regina v. Plunkett	21 U. C. R. 536	100
Regina v. Roddy	41 U. C. R. 291	574
Regina v. Rowlands	2 Den. C. C. 386	662
Regina v. Rubidge	25 U. C. R. 299	458
Regina v. Severn	2 S. C. R. 70	476, 477
Regina v. Spencer	11 U. C. R. 31	457
Reidpath's Case	L. R. 11 Eq. 86	433
Renaud v. Great Western R. W. Co	12 U. C. R. 408	606
Reesser v. Trotter	26 Gr. 154	90
Revell and County of Oxford, Re	42 U. C. R. 337	215
Rex v. London Dock Co	5 A. & E. 161	61
Rex v. Herstmonceaux	7 B. & C. 551	444
Rex v. Liston	5 T. R. 341	660
Rex v. Pywell	1 Sterkie's N. P. C. 402	662
Rex v. Sparrow	2 Strange 1123	212
Rhodes v. Aerdale Drainage Commissioners	1 C. P. D. 402	223
Rhodes v. Waird	16 Ohio 573	49
Richards v. Delbridge	18 Eq. 11	392, 396, 518
Richards v. Richards	2 B. & Ad. 447	392
Richardson v. Reed	4 Gray (Mass.) 441	629
Richardson v. Yonge	L. R. 6 Ch. 478	428
Richmond v. North London R. W. Co	L. R. 3 Ch. 679	220
Recket v. Directors, etc., of Metropolitan R. W. Co.	L. R. 2 H. L. 198	61
Riddell v. Dolree	10 Sim. 244	518
Ridgway v. Wharton	6 H. L. Cas. 258	73
Rigg v. Manchester R. W. Co	14 W. R. C. P. 834	591
Roberts v. Brett	11 H. L. 337, 18 C. B. 561, 6 C. B. N. S. 611	401
Roberts v. Williams	4 Ha. 129	473
Robertson v. Robertson	25 Gr. 456	226
Robinson v. Lowater	17 Beav. 592, 5 DeG. M. & G. 272	412, 413
Robson v. Bennett	2 Taunt. 388	670
Robson v. Carpenter	11 Gr. 293	473
Roe v. Southard	10 C. P. 488	86
Rolin v. Steward	14 C. B. 595	404
Rolin v. Cross	45 N. Y. 207	483
Rolston v. Lawson	17 U. C. R. 494	633
Rooke v. Lord Kensington	2 K. & J. 761	557

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Roope v. D'Avigdor	10 Q. B. D. 412	310, 313, 314
Rosher, Re—Rosher v. Rosher	26 Ch. D. 801	490
Ryck v. Canada Life Assurance Co.	17 Gr. 550	496
Ryckman v. VanVoltenburg	6 C. P. 385	148
Ryckmann v. Canada Life Assurance Co.	17 Gr. 550	90, 91

S.

Sabin v. Heape	27 Beav. 553	540, 545
Saint v. Pilley	L. R. 10 Ex. 137	469, 471
Salmon Falls Manufacturing Co., The, v. Goddard	14 How. U. S. 446	72
Same v. Shields	32 C. P. 602	433
Sanborn v. Sanborn	11 Gr. 359	226
Sanders v. Malsburg	1 O. R. 178	381
Saxon Life Assurance Co., in re	2 J. & H. 408	307
Saylor v. Cooper	8 A. R. 707	199
Scales v. Griffin	2 Dong. (Mich.) 54	483
Scane v. Duckett	3 O. R. 370	643
Scarlett v. Corporation of York	14 C. P. 161	100
School Trustees of Toronto v. City of Toronto	23 U. C. R. 203	271
School Trustees of Township of Hamilton v. Neil	28 Gr. 408	271
Schroeder v. Cleugh	46 L. J. Q. B. 365	289
Scio, The	L. R. 1 A. & E. 353	84
Scott v. Sampson	8 Q. B. D. 491	57
Scott v. Trustees of Union School Bathurst	19 U. C. R. 28	271
Scripture v. Lowell Mutual Fire Ins. Co.	10 Cush. 356	345, 348, 351, 355
Secord v. County of Lincoln	24 U. C. R. 141	185, 203, 217
Sells and Village of St. Thomas, Re	3 C. P. 286	185
Seymour v. Brecon	28 L. J. N. S. Ex. 243	742, 743
Shallcross v. Finden	3 Ves. 737	414
Shallcross v. Wright	12 Beav. 505	540
Shannon v. Shannon	1 Sch. & L. 324	628
Shaver v. Allison	11 Gr. 355	695
Shaw v. Borrer	1 Keen. 569	545
Sheldon v. Cox	2 Eden. 224	473
Shepard v. Hall	1 Conn. 494	129
Shepley v. Hurd	3 A. R. 549	695
Sherborn v. Wells	3 B. & S. 784	634
Sherrard v. Lafayette	3 Dill. C. C. 236	205
Short v. Ruttan	12 U. C. R. 79	630, 632
Siggers v. Evans	4 E. & B. 367	160
Sikes v. Wild	1 B. & S. 587	48
Simpson v. Chapman	4 DeG. M. & G. 154	238, 239, 240
Simpson v. Ottawa & Prescott R. W. Co.	1 Ch. Ch. 126	247, 265
Skerrard v. Lafayette County	3 Dill. C. C. 236	185
Slater v. Oliver	7 O. R. 158	642, 643
Sloan v. Creasor	22 U. C. R. 127	578, 579
Smart v. McEwan	18 Gr. 623	90, 496
Smith v. Hutchinson	2 A. R. 405	670
Smith v. Smith	13 Gr. 81	540, 543
Snarr v. Baldwin	11 C. P. 353	221
Snowball v. Dixon	4 Y. & C. 511	359
Soames v. Martin	10 Sim. 287	177, 179
Solomon v. Bitten	8 Q. B. D. 176	169
Somerset Coal Co. v. Harcour	24 Beav. 571	10, 18
Spalding v. Shalmer	1 Vern. 303	415

NAMES OF CASES CITED.

	WHERE REPORTED.	Page of Vol.
Spears v. Miller	32 C. P. 660	196, 199
Sproule v. Strafford	1 O. R. 335	554
Stainton v. Carron Co	18 Beav. 146	240, 251
Stanley v. Western Ins. Co.....	L. R. 3, Ex. 71	345, 356, 353
Stapley et al. v. London, Brighton and South Coast R. W. Co.	L. R. 1, Ex. 21	614
Star Kidney Pad Co. v. Greenwood	5 O. R. 28	125
State of Minnesota v. City of Hastings	24 Minn. 78	184
State of Minnesota v. Supervisors of Town of Lime	23 Minn. 521	185, 203, 220
State of Missouri v. Green County	34 Mo. 540	185
Stead v. Liddard	8 Moo. 2	513
St. Michael's College v. Merrick	1 A. R. 532	642, 643
Stone v. Godfrey	5 DeG. M. & G. 76	307
Stone v. Marsh	6 B. & C. 564	310
Stott v. Fairlamb	48 L. T. N. S 574	129, 134, 135
Stratford &c. v. County of Perth, Re	38 U. C. R. 112	203
Stratton v. Metropolitan Board of Works	L. R. 10 C. P. 76	271
Strong v. Bird	18 Eq. 315	329
Stronghill v. Austey	1 DeG. M. & G. 635	414, 540, 541
Stroud v. Austin	1 Cabb. P. R. 119	40
Stroud v. Gwyer	28 Beav. 130	239
Strull v. Farlar	16 M. & W. 249	40, 41, 51
Sturgis v. Moase	24 Beav. 541	199
Stuart v. Tremaine	3 O. R. 190	643
Stuyvesant v. Browning	1 Jones and Spencer (N.Y.S.C.) 203	483
Surman v. Surman	5 Mad. 123	665
Sutherland v. East Missouri	10 U. C. R. 626	185
Swann v. Falmouth	8 B. & C. 460	448
Symons v. Patchett	7 E. & B. 568	40

T.

Tabor v. Cunningham	24 W. R. 153	498
Tanqueray, Re	20 Ch. D. 477	415, 547
Tattersall v. Howell	2 Mer. 26	492
Taylor v. Cobourg, etc., R. W. & M. Co.	24 C. P. 200	497
Taylor v. Jermyn	25 U. C. R. 86	86
Taylor v. Whittemore	10 U. C. R. 440	21
Teed v. Biere	5 Jur. N. S. 381	240
Tench v. Great Western R. W. Co	33 U. C. R. 8	63
Thames Tunnel Co. v. Sheldon	6 B. & C. 341	567
Thomas v. Bretnell	2 Ves. Sen. 313	540
Thompson and Curzon, Re	W. N. 85, p. 60	537
Thomson v. Gibson	8 M. & W. 288	359
Thomson's Estate, In re—Herring v. Barrow	13 Ch. D. 144	666
Thorpe v. Cooper	5 Bing. 116	578
Tiffany v. Clarke	6 Gr. 474	392, 518
Tilson v. Town of Warwick Gas Light Co.	4 B. & C. 962	283
Toms v. Corporation of Whitby	35 U. C. R. 195	456
Toms v. Wilson	4 B. & S. 442	359
Tone v. Preston	24 Ch. D. 139	556
Toronto Hospital Trustees v. Denham	31 C. P. 203	86
Totten v. Bowen	8 A. R. 602	392
Totten v. Douglas	18 Gr. 341	90
Tower v. Schenectady R. W. Co.	7 Hill 47	174

NAMES OF CASES CITED.	WHERE REPORTED	Page of Vol.
Township of Brock v. Toronto & Nipissing		
R. W. Co.	17 Gr. 425	216
Township of East Zorra v. Douglas	17 Gr. 462	271
Townsone v. Tickell	3 B. & Al. 31	160
Treadgar Iron Works Co. v. Guyliged	1 Cabb. P. R. 27	40
Troubadour, The	L. R. 1 A. & E. 302	84
Trust and Loan Co. v. Lawrason	6 A. R. 286	445, 449
Trustee &c. of Hanson v. Stetson	3 Pick. 506	129
Tylden v. Hyde	2 S. & S. 238	416
Tyrwhitt v. Dawson	28 Gr. 112	678
Tuff v. Warman	2 C. B. N. S. 754	609, 611, 614

U.

Union Fire Ins. Co. v. Fitzsimmons	32 C. P. 60	419, 433, 438
Union Fire Ins. Co. v. O'Gara	4 O. R. 359	419
United Life, Fire & Marine Ins. Co. v. Foote	10 Am. R. 735; 22 Ohio 340	345, 346, 349, 356

V.

Vandecar v. East Oxford	3 A. R. 131	61, 193
Vansteenbergh v. Kortz	10 Johns. 170	346
Vashon and Corporation of Township of East Hawkesbury, In re	30 C. P. 194	684
Verney v. Hickman	5 V. & B. 271	739
Villers v. Beaumont	1 Vern. 100	473
Vise v. Foster	L. R. 7, H. L. 318	239
Vogel v. Grand Trunk R. W. Co.	10 A. R. 162	605
Voorhees v. Presbyterian Church of Amsterdam	5 How. Pr. R. 71	346

W.

Wallace v. Littell	11 C. B. N. S. 369	129, 133, 134
Waller v. Loch	7 Q. B. D. 619	578
Walsh v. Lonsdale	21 Ch. D. 9	643
Walsh v. Natrass	19 C. P. 453	310
Walton v. Dodson	3 C. & P. 162	513, 514
Wapels v. Ball	29 C. P. 405	562
Warburton v. Loveland	2 Dow. & Cl. 489	438
Ward v. Smith	11 Pr. 19	42, 44, 45
Wardell v. Chisholm	9 C. P. 125	629, 631, 632, 633
Warren v. Taylor	9 Gr. 61	496
Warriner v. Rogers	16 Eq. 340	392, 396, 518
Waterhouse v. Bishop	20 C. P. 29	522
Waterous v. Bishop	20 C. P. 29	363
Waterous v. Montgomery	36 U. C. R. 1	695
Waters v. Merchants Louisville Ins. Co.	11 Peters 213	345, 348
Waters v. Thorn	22 Beav. 547	752
Watson v. Ambergate R. W. Co.	15 Jur. 448	49
Watson v. Bradshaw	6 A. R. 666	517
Webster v. Webster	31 Beav. 393	740

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Webster and Corporation of West Flamborough, Re.....	35 U. C. R. 590	100, 684
Wedderburn v. Wedderburn	22 Beav. 84	239, 240
Wellington v. Chard	22 C. P. 518	142
Wallock v. Constantine	2 H. & C. 146	310, 313
Wells v. Abrahams	L. R. 7 Q. B. 554	310, 211, 313, 315
West v. Birney	1 Russ. & M. 431	490
Weston v. Arnold	L. R. 8 Ch. 1084	554
Whateley v. Whateley	14 Gr. 430	560
Whatten v. Cradock	1 Keen 287	288, 290
Wheeler v. Claydon	16 Beav. 169	546
Whimsell v. Giffard	3 O. R. 1	444, 448
White v. Spetigue	13 M. & W. 602	310
Whitfield v. Roberts	7 Jur. N. S. 1238	288, 290
Whitfield v. South Eastern R. W. Co	E. B. & E. 121	58
Whitlaw v. Taylor	45 U. C. R. 446	513
Whitney v. Toby	6 O. R. 54	507, 642
Wild v. Milne	26 Beav. 504	226
Wilde v. Wilde	20 Gr. 521	91
Wilkinson v. Charlesworth	2 Beav. 470	290
Wilkins v. Jodrell	13 Ch. D. 564	177, 180
Willcocks v. Howell	5 O. R. 360	578
Willett v. Blanford	1 H. A. 253	239, 240
Williams, Ex parte	7 Ch. D. 138	445
Williams v. Lake	2 Ell. & Ell. 349	513, 514
Williams v. Mudgett	2 Tex. Law Rev. 337	586, 592
Williams, Re	1 Ch. Ch. 372	665
Williams v. Robinson	20 C. P. 255	310, 312
Wilson v. Kyle	28 Gr. 104	90
Wilson v. Northampton and Banbury Junction R. W. Co	9 Ch. 279	43
Wilson v. Port Hope	2 Gr. 384	684
Wiltshire Iron Co., In re	L. R. 3 Ch. 443	670
Winstanley, Re	6 O. R. 315	490
Winter v. Brockwell	8 East. 308	112
Winter v. Keown	22 U. C. R. 345	100
Wise v. Birkenhead	29 L. J. N. S. Ex. 240	742, 743
Wittiers v. Kennedy	2 M. & K. 607	414
Withrow v. Malcolm	6 O. R. 12	382, 367
Wolverhampton, etc., Co. v. Hawksford	6 C. B. N. S. 338	567
Wood v. Lake	Sayer's R. 3	112
Wood v. Leadbitter	13 M. & W. 838	19, 115
Wood v. Manley	11 A. & E. 34	112
Wood v. McAlpine	1 A. R. 234	140, 143
Wood v. Nunn	5 Bing. 10	445
Wood v. Wood	L. R. 9, Ex. 191	720
Woodbridge v. Spooner	3 B. & Al. 233	130, 135
Woodecock v. Houldsworth	16 M. & W. 124	420
Woodward v. Ball	6 C. & P. 577	408
Wright v. Midland R. W. Co	51 L. T. N. S. 539	605
Wright v. Rankin	18 Gr. 625	90
Wright v. Woodgate	2 Cr. M. & R. 573	578
Wrigley v. Sykes	21 Beav. 337	412
Wylie v. Wylie	4 Gr. 278	226
Wylie v. Rollen	32 L. J., Ch. 782	545
Wynch, Ex p.	5 DeG. M. & G. 188	374

Y.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Yates v. Finn	13 Ch. D. 839.....	238
Yates v. Great Western R. W. Co,.....	2 A. R. 226	522
Yeatman v. Yeatman.....	7 Ch. D. 210.....	240, 251, 252
Yeomans v. Wellington.....	4 A. R. 30.....	60, 61
Yeomans v. Williams.....	L. R. 1 Eq. 154.....	518, 520
Young v. Corporation of Leamington.....	8 Q. B. D. 579; 8 App. Cas.....	617, 184
Young v. Derenzy	26 Gr. 509	520
Young v. Royal Leamington Spa.....	8 App. Cas. 517	205

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

DAVIS V. LEWIS ET AL.

Trustees—Power of one to bind others—Easement—Acquiescence.

The trustees of M., deceased, who held the legal estate in land in trust for sale for the purpose of a reservoir, sold to one Z. in 1854, a portion of lot ten, Niagara Falls Survey, for the purpose of a reservoir, the intention being to run a line of pipes over the residue of said lot to Niagara Falls, where a pump-house was to be constructed for the purpose of forcing the water to the reservoir, and thence it was to be distributed by pipes over the town of Niagara Falls. T. B., as well as E. B. M., the acting trustee, agreed to extend this lease for ever at a rental to be fixed every twenty-one years. The trustees subsequently sold the land in question to S. B., son of T. B., whose place, it was understood, S. B. was to take, T. B. having the right of purchase under his lease, and having expended large sums in improving the property. S. B. subsequently mortgaged to a certain company, who sold under foreclosure proceedings to the plaintiff. The land through which such pipes were to run had been devised by one M. to E. B. M., his wife and three others as trustees. In 1854 E. B. M. alone leased it to T. B. for fourteen years. In 1854 T. B. leased a strip 8 feet wide by 650 feet long to Z., for the purpose of laying his pipes therein, for ten years, at a nominal rent, and both T. B. and E. B. M., in that year, by separate instruments, covenanted with S. B. that she or T. B., if he should purchase the land under a provision in his lease for that purpose, would continue the lease to Z. for twenty-one years, perpetually renewable, at a rent to be fixed by arbitration. Z. constructed the reservoir, &c., and laid down the pipes in 1854, and the town had been supplied by them ever since. In 1864 E. B. M. gave a further lease to T. B. for seven years, and in 1868 she conveyed to S. B., the appointee of T. B., his father. S. B. mortgaged to a loan company, who sold under a decree for sale to the plaintiff, stating in the adver-

1—VOL. VIII O.R.

tisement that it was subject to the right of the defendants, who represented Z. to lay their water-pipes under the lease from T. B. to Z. After the expiration of that lease no further lease had been executed, but \$12 a year was, by agreement, paid as rent to T. B. and to S. B. until the title became vested in the plaintiff, who refused to accept rent or to recognize defendants' rights, and brought trespass against them.

- Held.* 1. That the lease of 1850 by E. B. M. alone was not binding on her co-trustees unless they could be shewn to have agreed to it.
 2. That the right of Z. to get a lease from T. B., under the covenant of 1854, continued as against T. B. under the second lease of 1864.
 3. That the defendants having, under the covenants of T. B. and E. B. M., taken possession and constructed the works, which were of a permanent and expensive character, and for the public benefit, and having paid rent up to the time of the plaintiffs acquiring title, and all parties having had notice, and made no objection, they were entitled to an injunction staying the action, and to a lease for twenty-one years, renewable at a rent to be fixed by arbitration or by the registrar of the Court.

TRESPASS for breaking and entering upon the land of the plaintiff in the town of Clifton, called and known as part of lot number 10, as laid down on a plan of the Niagara Falls Company's lands drawn by J. W. Fell, and registered in the registry office of the county of Welland, and excavating holes in the said land, and taking away sand, gravel, and earth therefrom, &c., &c.

Pleas: 1. Not guilty.

2. Lands not the lands of the plaintiff.

3. The defendants did what is complained of by the plaintiff's leave.

4 and 5. Prescription for easement for twenty years.

6. On equitable grounds. This plea is set out as it shews the defendants' title set up at the trial. It stated as follows: The plaintiff had no right to the land he claimed until 1875: that in 1854 Samuel Zimmerman was desirous of constructing water works for the supply of water to the inhabitants of Clifton, which works were intended to consist of a reservoir to be placed on a parcel of land about one rood thirty-two perches, near to but on a higher level than the land the plaintiff claimed, and of connected pipes to form a continuous pipe extending from a point near the Niagara River above the Falls of Niagara to the said reservoir for the purpose of forcing and passing the water from the river through the pipe to the reservoir, and which pipe it was proposed to have placed and carried through the

land claimed by the plaintiff, and of distributing pipes from the reservoir, and of the necessary buildings, &c., for such purposes: that by an indenture of the 7th of August, 1850, made between Ellen B. Murray and Thomas Barnett, Ellen B. Murray, then being owner of the land claimed by the plaintiff, demised the said land to Barnett for fourteen years at the yearly rent of \$48, and Ellen B. Murray covenanted that Barnett, at the end of the term, if the land should be sold, should have the first offer to buy the same, and in the event of his not buying arrangements were made for Ellen B. Murray paying Barnett for his improvements: that by an indenture of the 9th of June, 1854, made between Barnett and Zimmerman, Barnett demised to Zimmerman so much of the said land, which had been as aforesaid demised to Barnett, as might be necessary for laying the pipes, hose, or other fixtures necessary for conducting the water from the river through the said land, being eight feet in width and 650 feet in length, commencing at the front of the land which had been demised to Barnett, and which was the land the plaintiff claimed, and extending thence westerly through the said parcel of land the length of 650 feet, for the term of ten years and two months, paying a yearly rental of \$1: that by an indenture of the 17th of July, 1854, made between Ellen B. Murray and Zimmerman, Ellen B. Murray covenanted with Zimmerman that in case Barnett at the expiration of his lease for fourteen years refused or failed to purchase the said land she would grant to Zimmerman a lease of the said strip eight feet wide and 650 feet in length for twenty-one years, at a yearly rent to be fixed by arbitration, and at the expiration of that time that she would grant a further term of twenty-one years, and so on renewable for ever, subject to a yearly rent to be fixed by arbitration: that by an indenture of the 18th of July, 1854, made between Barnett and Zimmerman, Barnett covenanted with Zimmerman that at the end of the lease before granted to Barnett for 14 years, in case Barnett should purchase the said land demised to him, that is, the land claimed by the plaintiff, he (Barnett) would

grant to Zimmerman a lease of the strip of land eight feet wide and 650 feet long for a term of twenty-one years, at a yearly rent to be fixed by arbitration—such lease to be renewable for ever at rents to be fixed by arbitration : that by an indenture of the 17th of July, 1854, made between Ellen B. Murray and Zimmerman, Ellen B. Murray, in consideration of \$360, granted to Zimmerman in fee the said land, containing one rood thirty-two perches, on which the reservoir was proposed to be placed : that Zimmerman, relying upon his said title, in 1854, with the full knowledge and acquiescence of Ellen B. Murray and Barnett, marked out and took possession of a certain strip of the said land eight feet in width and 650 feet in length as aforesaid, and which strip commenced at and terminated at the limits of the land claimed by the plaintiff: that Zimmerman at great cost proceeded to construct the said waterworks, and completed the same in the year 1854 or 1855, and as part of the waterworks he constructed the reservoir on the land containing one rood thirty-two perches, and laid down connected pipes forming a continuous pipe extending from a point near to the said river through the whole length of the said strip to the reservoir, for the purpose of the passage of the water from the river to the reservoir ; and the said waterworks have ever since been maintained for supplying water to the inhabitants of Clifton, and the said continuous pipe has been ever since maintained as and through the said strip as part of the said waterworks, and during all that time has been used for the passage of the water to the residents, and during all that time it has been and is the only means by which the water can be supplied to the said waterworks : that the lease to Barnett for fourteen years ended upon the 7th of August, 1864: that he made large improvements upon the land, and for which he was entitled to be paid, and was entitled also to remove certain improvements he had made ; but Barnett not being prepared to purchase the land, and Ellen B. Murray, not being prepared to pay for the improvements, that by an indenture of the 7th of

August, 1864, Ellen B. Murray demised to Barnett the said land claimed by the plaintiff for seven years at the yearly rent of \$48, and Ellen B. Murray covenanted that if the land was sold or offered for sale before the expiration of the lease, Barnett should have the first offer of the same, with special clause as to improvements: that Barnett continued in possession till about the 16th of December, 1868: that by an indenture of the date last mentioned Ellen B. Murray* conveyed the said land in fee to Sidney Barnett the son of the said Thomas Barnett. And the defendants said that the conveyance to Sidney Barnett was made in the interest and for the benefit of Thomas Barnett, and was in effect a purchase by Thomas Barnett of the land under the terms of the lease he had; and Sidney Barnett had, before the making of the conveyance to him, full notice and knowledge of the facts in the pleadings set forth; that by an indenture of the 26th of December, 1871, Sidney Barnett mortgaged the said land in fee to the Security Permanent Building and Savings Society at St. Catharines for the sum of \$7,384; and by an indenture of the 16th of May, 1872, Sidney Barnett mortgaged his equity of redemption in the land to Albert G. Brown for the sum of \$2,000: that by an indenture of the 2nd October, 1873, Albert G. Brown assigned the mortgage he had to Ellen Davis, the wife of the plaintiff: that default having been made in the payment of the mortgage assigned to Ellen Davis, she, the said Ellen Davis, under the power of sale contained in the said mortgage, by an indenture of the 13th of November, 1873, sold and conveyed the said land to Hiram Bender: that default having been made in the payment of the money under the mortgage to the society before mentioned, proceedings were taken in Chancery, and the society obtained a decree for sale of the said land, and on the 13th

* Ellen B. Murray was not the only grantor. The others were Charles T. S. Kevern, Henry P. McKillop, and John A. Orchard, who were all described as "Executrix, executors, and trustees of the last will" of General Murray.

of April, 1875, the land was sold at public sale to the plaintiff; and by an indenture of the 8th of June, 1875, the said society, in pursuance of the said sale, conveyed the said land to the plaintiff, the same land being the land claimed by the plaintiff in this action: that Zimmerman died in 1857: that the said waterworks and all the rights and interests which he had acquired in the said strip of land, and in all other the land and premises aforesaid, became, upon his death, vested in the trustees and executors under his last will and testament, and remained so vested until the 20th of October, 1859, when the same became vested in the Bank of Upper Canada, who purchased the same at sheriff's sale, and the same remained so vested in the said bank until the 31st of March, 1860, when the same became vested in the defendant Lewis, and one George Bender, deceased: that by an indenture of the 11th of February, 1860, the trustees and executors of the late S. Zimmerman granted and confirmed to the said Lewis and Bender all their, the said trustees and executors' interest, (if any) that still remained in them in the water-works, including the said parcel of land of one rood and thirty-two perches, on which the said reservoir was constructed, and the said trip of land eight feet by 650 feet: that George Bender died on or about the 23rd of April, 1866: that all the said rights and interests then were and became vested in the said Lewis in his own right, and in the said Lewis, Edward Redpath and William H. McClive, as trustees under the last will and testament of the said George Bender, and they continued so vested until the month of August, 1876, when they were and became vested in the now defendants: that the now defendants before and at the time of the committing of the trespass in the declaration mentioned, and from thence were the owners of the said water works, including the said continuous pipe placed in and extending through the said strip of land eight feet by 650 feet: that the said term for ten years and two months, for which the said strip of

land had been demised to Zimmerman, expired on the 7th of August, 1864, and the defendants and all those through whom they claimed title to the water works and to the said strip of land had at all times been ready and willing, and the defendants still were ready and willing to accept another lease of the said strip of land for twenty-one years in accordance with the terms of the indenture next mentioned, and to do all acts necessary on their part for fixing the rent to be paid as provided in the indenture of the 17th of July, 1854, and in the indenture of the 18th of July, 1854, and that such lease had without their fault not been made or executed: that the defendant Lewis and others, his co-owners, assignees of Zimmerman as to the said strip of land, by agreement with Thomas Barnett, and with the consent of Ellen B. Murray, continued to pay the sum of \$1 per year for the yearly rent of the said strip to Thomas Barnett until the conveyance was made to Sidney Barnett (16th December, 1868): that Sidney Barnett at all times recognised the rights of the assignees of Zimmerman to have such new lease, and on obtaining the conveyance from Ellen B. Murray agreed with the said Lewis and the co-owners of the waterworks that the rent to be paid under the new lease for 21 years should be \$12 per annum: that Lewis and his co-owners continued to pay the said sum of \$12 yearly to Sidney Barnett until the said Hiram Bender became possessed of the Equity of Redemption of Sidney Barnett, (13th November, 1873), and they continued to pay the said Hiram Bender his yearly rent of \$12 until the plaintiff became the purchaser of the land as before mentioned (13th April, 1875); and since then they had always been ready and willing, and offered to pay the said rent to the plaintiff, but he had always refused to accept the same: that the said society before and at the time Sidney Barnett made to them the said mortgage, as well as those from whom they derived title from Ellen B. Murray, had full notice and knowledge of all the facts in the said pleadings . . . ioned that had occurred before the making of the

said mortgage ; and the society sold the land to the plaintiff subject to the right of the said Lewis and his co-owners to maintain the pipe through the said land, and to claim a lease of the said strip of land for twenty-one years ; and the plaintiff purchased the said land subject to such rights : that the indentures to which Ellen B. Murray or Thomas Barnett were parties, were made with the knowledge for which the said strip of land was to be used, and they were made for the purpose of the strip being so used ; and the plaintiff had at all times full notice and knowledge of the facts in the pleadings mentioned : that in January, 1881, the said continuous pipe burst in that part of it lying within the said strip, and the water in the said pipe escaped therefrom on to the land of the plaintiff in the declaration mentioned ; and the bursting of the said continuous pipe in and through the said strip, and the escape of the water from the same, and the damage done thereby, constituted the alleged trespasses complained of : that the defendants contended that in equity they were entitled to be considered as lessees of the said strip of land under a lease for twenty-one years from the persons having the valid title to grant the same, and as having been in possession of the said strip of land under such lease before and at the time of the said alleged trespass ; and they prayed that the plaintiff might be ordered and directed to do all acts necessary on his part to entitle the defendants to receive a valid lease from the plaintiff, and that the defendants might have such further and other relief as might seem meet ; and they alleged that there was no negligence or want of care in placing the continuous pipe, or in maintaining or using it, or any part of the water works, and that the pipe burst and the water escaped therefrom from the intense frost, and against which no care could guard, and were not the act of the defendants, nor caused by their want of care.

7. By way of equitable defence, similar in substance to the 6th plea, the only new facts stated being that Samuel Zimmerman in 1854 purchased from Ellen B. Murray and

Alexander Denoon, the true owners of lot No. 10 of the Niagara Falls survey, including the parcel of land containing 1 rood 32 perches, for the purpose of constructing thereon the reservoir, as the vendors well knew, for the purposes in the preceding plea mentioned, and for the purpose for which it had been used. And the defendants submitted that they were entitled in equity to be considered as owners by necessity as well as owners by equitable estoppel of the right, privilege and easement to lay pipes, tubes, hose, or other fixtures over, across and through the said lands, and to repair, renew, and relay the same when necessary; and the defendants prayed the Court might, under the facts stated, declare that the defendants were entitled to the said privilege or easement upon such terms as the Court might see fit to impose.

Issue.

The cause was tried at the Fall Assizes held at Welland before Morrison, J., and a jury, in 1881.

The finding endorsed was: "Verdict. Jury find for plaintiff, \$150, through neglect. October 19th, 1881." Upon this judgment was given by the learned Judge, on the 1st of February, 1884, for the plaintiff, with costs.

McClive, at the Hilary Sittings of 1884, obtained an order *nisi* calling upon the plaintiff to shew cause why the entry of the verdict and judgment thereon should not be set aside and a judgment entered for the defendants, or a new trial had between the parties, on the ground that the jury intended to find, and did find, there had been no negligence on the part of the defendants, and that the verdict as entered was entered erroneously for the plaintiff.

At the Michaelmas Sittings, 1884, *McClive* supported the order *nisi*. The trustees of General Murray having sold to Samuel Zimmerman lands for a reservoir, and knowing that such land could only be used for that purpose by means of a pipe line from the Niagara River to the reservoir in question, and one of the trustees having entered into an agreement to give a perpetual lease in case

Thomas Barnett did not eventually acquire the property over which the pipe line was proposed, such trustees and their assigns would be bound upon proper compensation being paid to grant such an easement. See *Washburn* on Easements, 3rd ed., page 45; *Gale* on Easements, 5th ed., p. 76-84, inclusive. Inasmuch as Thomas Barnett and Sidney Barnett, who became entitled to the lands in question by the agreement of sale made between the trustees and Thomas Barnett, had always recognized the easement in question, and as Thomas Barnett had agreed that if he or his heirs or assigns became the purchaser of the lands in question, he or they would grant a perpetual lease, and as the plaintiff was in fact and in law the assignee of Thomas Barnett, the plaintiff is equally bound to carry out the agreement of Thomas Barnett. As all the agreements and conveyances referring to the matter were on record, and as the easement was a notorious one, and the plaintiff purchased the lands in question at a sale, and one of the conditions expressly reserved the right of the defendants to the easement in question, the plaintiff also is bound by such condition, though no such reservation appears in any of the conveyances. He cited *Hervey v. Smith*, 22 Beav. 299; *Duke of Devonshire v. Eglin*, 14 Beav. 530; *Ramsden v. Dyson*, L. R. 1 H. L. 140; *Dann v. Spurrier*, 7 Ves. 235; *Clavering's Case*, 5 Ves. 490; *Powell v. Thomas*, 6 Hare 300; *Somerset Coal Co. v. Harcourt*, 24 Beav. 571; *Duke of Beaufort v. Patrick*, 17 Beav. 60; cases collected in *Tudor's Leading Cases on Real Property*, 3rd ed. pp. 171-8; *Gale* on Easements, pp. 131, 139. He also submitted that even if the trustees had no power to convey, their act would be binding unless disaffirmed by the *cestui que trust*, and they had never disaffirmed the act, and Sidney Barnett, who was willing, as well as the plaintiff, who was unwilling, were bound to carry out the contract of the trustees.

J. K. Kerr, Q. C., contra. The title which Barnett had from Mrs. Murray expired in 1864, and the lease Zimmerman had from Barnett expired with that lease to Barnett.

Barnett got a further lease in 1864 from Mrs. Murray, and that expired in 1871. Mrs. Murray had no power, as one of several trustees, to make these leases, so the title Zimmerman got from Barnett was not a valid title. Mrs. Murray also covenanted with Zimmerman to grant him a lease of the land in case Barnett did not buy the property; but that contract was of no effect, for Mrs. Murray had not the power alone to rent the estate she represented as one of several trustees. Neither Barnett nor Zimmerman had ever a legal title to the property: 1 *Platt* on Leases, 731; *Rawle* on Covenants, 586. Bender and Lewis acquired such title as Zimmerman had. On the 16th of December, 1868, Mrs. Murray and her co-trustees sold the land to Sidney Barnett subject to the then current lease from Mrs. Murray to Thomas Barnett, which had been made in 1864 for years. Barnett did not elect to buy under the right of purchase he had by that lease, so that his interest expired wholly with that lease: *Rawle* on Covenants, 113, 114. Before it expired, that is, on the 16th of December, 1868, the trustees sold the land to Sidney Barnett, the son of Thomas Barnett. The title of Sidney Barnett is the title by which the plaintiff claims, and under it he has a perfect legal right to the land in question. The right of renewal may be lost, but there is no such right here: *Finch v. Underwood*, 2 Ch. Div. 310; *Lehmann v. McArthur*, L. R. 3 Ch. 496; 1 *Platt* on Leases 758.

McClive, in reply, referred to 2 *Spence's Eq. Jur.* 765-7; *Plimmer v. Mayor of Wellington*, L. R. 9 App. Cas. 699.

February 9, 1885. WILSON, C. J.—The counsel agreed during the argument that the Court need not consider whether the verdict has or has not been rightly entered.

As entered, it is: "The jury find for the plaintiff \$150 damages *through neglect*;" that is, through the defendants' default, whereas the affidavits filed shew the finding really was that the plaintiff's damage was \$150, but it did not arise through the defendants' neglect, and that the title to the property is all that is to be determined.

That gets rid of the difficulty of considering not only the correctness of the verdict and the entry of it, but whether the acts complained of would, in any view of the case, be considered to be a trespass.

As to the title. It appears the land was the property of General Murray, and that he by his will of the 22nd of May, 1841, devised it to his wife and three others, Stepney Cowell, Alexander Denoon, and Edward Nelson, as trustees and executors, so far as relates to his lands in Upper Canada, to sell.

There is provision in the will that if any of the trustees should die in the lifetime of the testator, or should renounce the trust, or in case they or any trustee to be appointed "under this present provision," shall die or be unwilling or unable to act, it shall be lawful for his wife during her widowhood, and after her decease or marrying again for his two eldest daughters for the time being, and after the decease of all his daughters, or in case they are under age or otherwise incapable of acting, then for the surviving or continuing trustees or trustee, or if there be no such trustee then for the retiring or remaining trustee for the time being, or if there be no such last mentioned trustee, then for the executors or administrators of the last deceased trustee, to nominate a fit *person* or *persons* to supply the place or places of the trustee or trustees so dying or becoming unwilling or unable to act."

There is a conveyance not mentioned in the pleadings, but the memorial of which is among the exhibits, dated the 17th of October, 1884, made between "Alexander Denoon, as one of the trustees under the will of General Murray, of the first part, to Samuel Zimmerman, of the second part, whereby the party of the first part, as such executor and trustee, and in consideration of the the sum of £90, to the party of the first part, and to Ellen B. Murray, the other of such trustees and executors, now paid," &c.

It would appear from the expression, *the other of such trustees*, that Mrs. Murray and Mr. Denoon were the only trustees at that time.

If two could convey, then that conveyance being executed by Mr. Denoon, and the one of the 17th of July, 1854, having been executed by Mrs. Murray to Zimmerman of the reservoir plot containing one rood thirty-two perches, a good title was acquired by Zimmerman to that parcel of land in fee. That parcel of land is not now in question. It is, however, material, as it is an essential part of the water works.

As to the strip of land in question. The lease of the 7th of August, 1850, made by Mrs. Murray to Thomas Barnett for fourteen years, under which Zimmerman claimed, by the deed of the 9th June, 1854, the parcel now in dispute of 8 feet by 650 feet, and the agreement between Mrs. Murray and Zimmerman of the 17th of July, 1854, and the agreement between Thomas Barnett and Zimmerman of the 18th of July, 1854, will fall to the ground, if Mrs. Murray could not by her own deed give, lease, or covenants, make it binding on her co-trustees. And I think these leases and covenants did not confer a title upon Barnett or upon Zimmerman unless it can be shewn the other trustees knew what Mrs. Murray had done and approved of it or did not object to it; for in such a case they may be said to have been assenting parties to the agreement with Zimmerman, and if they approved of it they would, I think, from the cases afterwards referred to, be bound to give effect to the covenant of Mrs. Murray, upon and by reason of which a very large expenditure was made. I do not think, however, it is necessary to have the trustees bound, if Thomas Barnett, or his son Sidney Barnett, or the plaintiff, is bound.

Then commenced a new state of things; for the lease of the 7th of August, 1850, having expired, Mrs. Murray, on the 7th August, 1864, granted a new lease to Thomas Barnett for 7 years and covenanted that if the land were sold or offered to be sold by the trustees before the expiration of the time, Barnett should have the first offer of purchase, and if he did not purchase, then the agreement which was made as to improvements should take effect.

After that lease was granted there were no further dealings between those claiming under Zimmerman and Barnett, (Zimmerman having died in 1857, and seven years before the lease for fourteen years to Barnett had expired.) Barnett, however, still assented to and allowed the water works to remain there and be carried on as theretofore, and after the lease to Barnett of 1864, for seven years, those claiming under Zimmerman continued to pay him rent for the strip of land which he held at that time or until the 16th of December, 1868, when the trustees conveyed the land to Sidney Barnett, in fee, the son of Thomas Barnett, and those claiming under Zimmerman continued to pay the rent to Sidney Barnett from 1868 till 1875, when his title was extinguished by sale under the decree of the Court of Chancery at the suit of the loan society.

If the agreement of the 18th of July, 1854, between Thomas Barnett and Zimmerman, made under the lease to Barnett of the 7th of August, 1850, by which Barnett covenanted that at the end of the fourteen years or sooner determination of that term, in case he purchased the land, he would grant to Zimmerman a perpetual lease of the strip, parcel of it, for the term of twenty-one years, can be carried forward and be held to be binding on Thomas Barnett under the new lease to him for seven years from the 7th of August, 1864, by reason that those claiming under Zimmerman still continued to pay Barnett the rent under his second lease in like manner as they had paid it to him under his first lease, then Thomas Barnett's son, Sidney, when he became the purchaser, with his father's assent, and with a full knowledge of all the facts, and afterwards received rent for the use of that strip, must be bound in like manner as his father to convey the strip to those who have the title under Zimmerman.

If that cannot be done, then whatever enforceable rights, as against Barnett, Zimmerman, or those claiming under him, had acquired, ended with that lease, which expired on the 7th of August, 1864. But I am of opinion the authorities shew the rights of Zimmerman and of those claiming

under him did not end with the first lease, which expired in 1864, but continued as against Barnett under his second lease, which continued till the deed was made to his son in December, 1868. It is true that Mrs. Murray, by her covenant of the 17th of July, 1854, also agreed to grant a perpetual lease, in terms of twenty-one years, of this strip to Zimmerman, at the expiration of the said years ending in 1864, or other sooner determination of the term, in case Barnett did not purchase the land. But I do not think she can be held bound by that covenant, although Barnett did not purchase the land at the end of the fourteen years, because it was a mere personal covenant, and not binding on the estate, and because she did nothing after that period in any way in recognition of the right of any one claiming under Zimmerman to demand a demise of the strip, and no demand was ever made upon her from that time to fulfil her engagement.

Those who are claiming under Zimmerman can, I think, set up no higher or other title than this, that Zimmerman had at one time the demise from Thomas Barnett for upwards of ten years under the lease of the 7th of August, 1850, and under the covenants of Barnett and of Mrs. Murray to grant him a perpetual lease, and under these assurances he took possession of the land and constructed expensive works of a permanent and beneficial nature, and for the public benefit; and he, and those claiming under him, have paid rent for the same from the 9th of June, 1854, until the 16th of December, 1868, when the trustees sold the land to Sidney Barnett, and from the last-named day to the parties legally entitled to the land, until 1875, when the plaintiff bought the land. Now, under what terms have the defendants had possession?

The works done upon the land were of an expensive and permanent kind, and Zimmerman contracted for the grant of a perpetual lease for the preservation and continuance of these works.

When the Loan Society advertised the land mortgaged by Sidney Barnett to them under the decree of the Court

of Chancery in May, 1875, they expressly stated therein that the sale was "subject, however, to the right of way of George Bender and Zenas B. Lewis to lay water pipes through to said lot No. 10 under a lease for that purpose from Thomas Barnett to the late Samuel Zimmerman;" so that all parties, by different ways and means, that is, Thomas Barnett, Sidney Barnett, the Loan Society and the plaintiff knew of that claim; and the plaintiff has without question permitted these works to be in and upon his land from the time he bought it, in June, 1875, until the bringing of this action in March, 1881. And at the trial, as I understand the evidence and the finding of the jury, the question was not what it is now agreed to make it, a question of *title*, but a question of *damages only for the negligence* of the defendants in not maintaining their works in a proper state of efficiency, by reason of which damage was done to the plaintiff.

The office of co-trustees is a joint office. If one refuse or be incapable of acting, the other cannot proceed alone; the administration in that case devolves upon the Court: *Lewin on Trusts*, 7th ed., 236. But it is said the act of one done with the sanction and approval of the other may be regarded as the act of all: *Messeena v. Carr*, L. R. 9 Eq. 260; although such sanction must be strictly proved: *Lee v. Sankey*, L. R. 15 Eq. 204.

In *Cafe v. Bent*, 5 Hare, 24, the testator appointed A. B. & C. executors and trustees of his will, and he directed that if either of them, or any succeeding trustee or trustees, should die or refuse or neglect or become incapable to act, the survivor of A. B. & C. and such new trustee or trustees to be nominated in their or either of their stead, should appoint a new trustee or trustees instead of A. B. & C., or either of them. A. disclaimed, B. died, and C. alone, though not the survivor of A. B. & C., appointed new trustees. Held, the new trustees were well appointed.

The Vice Chancellor said: "The new appointment might be supported by the words of the will, and besides if the three trustees were not here mentioned by name in the

introductory part of the clause it would have been clear to demonstration that the power was annexed to the office of trustee, in which case the disclaimer of one would have vested the office of trustee in the remaining two, and the power would in fact have been exercised by the remaining trustee; and I think the cases referred to justify me in holding the trustees were named in the introductory part of the clause, not for the purpose of founding a distinction between them and future trustees, but only because they happened in fact to be the trustees for the time being." One of these trustees was the testator's son and another his son-in-law.

In *Messeena v. Carr*, L. R. 9 Eq. 260, two trustees under a will had power to buy an annuity for *cestui que trust*, or to pay him the principal sum. One trustee alone paid the *cestui que trust* a sum equal to about three-fourths of the principal. Held, the act of the one trustee was valid, as the other trustees had sanctioned and approved of what was done. But that related to mere personal property.

In *The Duke of Devonshire v. Eglin*, 14 Beav. 530, the defendant consented to the plaintiff making a watercourse through the plaintiff's land upon being paid a proper compensation. The watercourse was made, but no grant was executed and no sum arranged. After nine years user the defendant stopped it up. He was restrained by decree from so doing, and a reference was made to the Master to fix a proper compensation. The Master of the Rolls said: "There was a parol agreement to allow the watercourse to be made through the defendant's land in consideration of the payment of a reasonable sum. The watercourse was made and was used for nine years without any dispute. At the end of that time, in consequence of other disputes, the defendant insisted on the price being ascertained. The work had, however, been effected and used nearly ten years, and I am of opinion the defendant cannot prevent the plaintiff's enjoyment of the right."

The water-course was made to supply the town of Gensington with water.

The Duke of Beaufort v. Patrick, 17 Beav. 60. In 1793 a company was formed for the purpose of making a canal over lands of which A. was owner and B. his lessee, and on payment of compensation the land was to vest in the company. B. was compensated but not A. In 1794 an Act was passed authorizing the construction of the canal, and it was enjoyed until the expiration of a lease which had been made in 1779 for 65 years, through which land the cut had been made. The representatives of A. brought ejectment for the land through which the canal passed and recovered in the action. Held, that in equity A. having sanctioned the formation of the canal, was not entitled to re-take possession, but only to a fair compensation. Held, also, that persons who had bought A.'s property with notice in the conditions of sale as to the canal were equally bound by the same equity, and that the Court might settle the compensation.

In *Hervey v. Smith*, 22 Beav. 299, A. sold to B., the owner of the adjoining premises, the right of using two chimneys on A.'s wall. The consideration was paid and they were used for eleven years, but no grant was executed. C. purchased A.'s house without notice of the right, but there being fourteen chimney pots on the wall and only twelve flues in A.'s house, the Court held that C. was put on enquiry, that he had constructive notice of the right, and was bound by it, and an injunction was granted restraining him from stopping up the two chimneys.

In *The Somerset Coal Canal Co. v. Harcourt*, 24 Beav. 571, a canal company under an Act giving compulsory powers took land, in 1797, of an infant, for the canal. The land was assessed at a rent of £14 a year. The proceedings were informal and did not bind the parties. The infant attained full age in 1806, and from that time a rent had been paid by the company not founded on that which had been assessed. The company had been threatened to be ejected, it being contended they were only yearly tenants. Held, the company was entitled to take the lands upon paying a proper compensation for the same. In *Tudor's*

Leading Cases on Real Property, 3rd ed. 171, many cases are cited to the like effect as the above.

Wood v. Leadbitter, 13 M. & W. 838, shews a parol license to lay pipes on the land in question is revocable. But that has not been the rule in equity.

Laird v. The Birkenhead R. W. Co., Johns 500, 6 Jur. N. S. 140, is a very important case, shewing in what cases and to what extent the Courts of Equity will interfere.

In *Bankart v. Tenant*, L. R. 10 Eq. 141, Lord Justice James, at p. 146, referring to *Rameden v. Dyson*, L. R. 1 H. L. 129, said the principle laid down in that case is this, p. 170: "If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

I am of opinion the defendants are entitled to an injunction restraining the plaintiff from further prosecuting this action, and to a decree directing the plaintiff to grant to the defendants a lease of the land in question for the term of twenty-one years at such named rent as the parties may agree upon, and if they cannot agree upon the same, that such rent be fixed by arbitration, as provided in the indentures of 9th of June, 17th of July, and 18th of July, 1854, before mentioned, or by the registrar of this Court; and that such lease shall provide for a renewal from time to time for a term of twenty-one years, renewable for ever, the rent for each term to be fixed as aforesaid; and that the damages assessed at \$150, and the verdict entered on the pleadings be set aside, and that the plaintiff do pay the costs of this action.

ARMOUR and O'CONNOR, JJ., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

ROBERTSON v. THOMAS.

Assignment for benefit of creditors—R.S.O. ch. 119, secs. 1 and 2.

An assignment for the general benefit of creditors does not come within the Chattel Mortgage and Bills of Sale Act, R. S. O. ch. 119.

THIS was an interpleader issue directed between the plaintiff, as trustee for the benefit of the creditors of one S. B. Simpson, and the defendants, as execution creditors of the assignor.

The issue was tried before Armour, J., without a jury, at Orangeville, at the Fall Assizes of 1884.

The husband of the execution debtor was examined as a witness, and proved that he transacted business under a salary: that she was largely indebted and unable to pay her debtors, and that in consequence of the defendants proceeding to realize their claim she concluded to make and did make to the plaintiff a deed of trust for the benefit of her creditors, in order that they might each obtain an equal share of the assets. The deed was in the usual form of trust deeds, containing the usual recitals of indebtedness, her inability to pay in full, and an agreement to assign all her estate to the defendant upon trust.

One of the creditors signified his acceptance by signing per his attorney a memorandum to that effect on the deed.

It was contended at the trial that there had not been an immediate delivery, and an actual and continued change of possession, and that the goods were not sufficiently described to satisfy the Chattel Mortgage Act.

The learned Judge, after reserving judgment, decided in favour of the plaintiff, holding that an assignment in trust for creditors did not come within the Chattel Mortgage Act, and therefore did not require registration, nor did the goods require to be specifically described.

During last Hilary Sittings *Nesbitt* moved on notice to set aside the judgment for the defendants, on the grounds that the learned Judge was in error in holding that an assignment for the general benefit of creditors did not come within the provisions of the Chattel Mortgage Act ; that the goods were not sufficiently described to satisfy that Act, nor had there been an immediate and continuous change of possession ; and that on the law and evidence the learned Judge was wrong in holding the plaintiff entitled to recover.

At the same Sittings *Nesbitt* supported the motion. The Chattel Mortgage Act does apply to assignments for the benefit of creditors. The intention of the Act was to provide against a party having the possession and apparent ownership of the goods and thereby obtaining a fictitious credit, and the Court will read the statute so as to give effect to the intent of the Legislature, and they will read the word "sale" here as meaning a conveyance of property, that is, a transfer of the legal title ; see *Caledonia R. W. Co. v. North Bristol R. W. Co.*, L. R. 6 App. Cas. 114.

But assuming this not to be the case, then the learned Judge found, on the canon of construction, that unless the conveyance came specially within the terms of the Act it was not covered by it, and the reasoning which the Court followed in *Baldwin v. Benjamin*, 16 U. C. R. 52 ; *Hamilton v. Harrison*, 46 U.C. R. 124, and kindred cases, indicates that the Court would not have held such an assignment as this within the Act had the same rule been adopted in the earlier cases. The reasoning in the latter cases is not new, and the case of *Baldwin v. Benjamin*, which originally established that rule of construction, was decided prior to the decision of *Harris v. Commercial Bank*, which is relied on. The classes of assignment which are now held not to be within the Act have always been held to be covered by the Act see *Harris v. Commercial Bank*, 16 U. C. R. 431, where it is expressly held necessary to register assignments for the benefit of creditors. This was also held in *Taylor v. Whittemore*, 10 U. C. R. 440 ; *Olmstead v. Smith*, 15 U. C.

R. 421; *Nolan v. Donnelly*, 4 O. R. 440; and as this law has not been questioned, on the ground of public policy, the Court will not interfere with that view. Then, even if the Court now did come to a different conclusion, it will feel itself bound by the former decisions: see *Holland v. Hodgson*, L. R. 7 C. P. 328, where Lord Blackburn holds that sixteen years lapse is sufficient; *Bain v. Fothergill*, L. R. 7 H. L. 158.

E. Myers, contra. Trust deeds do not come within the Chattel Mortgage Act. The rules for the construction of statutes require that we should consider the state of the law prior to the statute, and the grievances sought to be remedied. The grievances were not frauds created by assignments for benefit of creditors, but those created by secret assignments, which perhaps had the effect of preferring one creditor, or of perpetrating a fraud on one particular creditor, or on the general body. If there had only been trust deeds the Act never would have been passed. The Revised Statutes are to be construed together, and as one large enactment on different subjects. The Act relating to fraudulent preferences, which immediately precedes the one in question, expressly excepts deeds such as this from its operation, and thus the Legislature has given its approval to such deeds. The spirit of the Act should prevail over its literal wording. The words "every sale" in the fifth section do not apply to trust deeds, which are not sales in the popular meaning of the term. The affidavit required to be made by the bargainer cannot refer to a trustee for the benefit of creditors. It requires him to swear that it is for good consideration, and not to protect the goods from the creditors of the assignee, when on its face the deed is for the benefit of creditors. The Courts have always questioned whether these deeds come within the Chattel Mortgage Act. This was the case in *Olmstead v. Smith*, 15 U. C. R. 426; and also in *Harris v. Commercial Bank*, 16 U. C. R. 443. In *Maulson v. Commercial Bank*, 17 U. C. R. 17, a distinction was made between these deeds and others. As to the contention that

it would be inadmissible to disturb what has always been considered as the law, this does not apply to cases where the law has never been really settled, and this point has not been expressly raised. It was always assumed to be the law that growing crops were within the Act; yet when the point expressly came up in *Hamilton v. Harrison*, 46 U. C. R. 124, the Court did not hesitate to hold otherwise. The literal wording of the Act was also obliged to yield to its spirit in *Kissock v. Jarvis*, 6 C. P. 393.

March 7, 1885. WILSON, C. J.—An assignment made for the benefit of creditors, that is, for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of the debtor their just debts, according to the terms of the R. S. O. ch. 118, sec. 2, is not a mortgage under ch. 119, nor can it be said to be a sale under sec. 5 of the same Act, and there can be no necessity for requiring an affidavit of the assignee, or his agent duly authorized in writing, to be made that such an assignment “is *bonâ fide* and for good consideration as set forth in the said conveyance, and not for the purpose of holding or enabling the bargee to hold the goods therein mentioned against the creditors of the barginor,” for there can be no doubt of the facts. Nor can it be necessary to make the assignment “void as against the creditors of the assignor,” for they are the very persons who are to benefit by its being maintained; nor can it even be necessary to provide that it shall be void “as against subsequent purchasers or mortgagees in good faith,” for it is very improbable that an assignment of the kind can be kept a secret transaction, or that there can be any subsequent purchasers or mortgagees in good faith to be protected.

The 5th section of that Act is wholly inapplicable to an assignment made for the benefit of creditors. It was made for their protection against sales to persons whose interests are opposed to the general creditors of the barginor.

It is singular this point has not been taken before, but now that it has been taken it seems to be quite plain that

the construction of the Act is that which my brother Armour has suggested and called attention to, and I am of opinion that such an assignment, whether it be made to one who is not a creditor, so long as a creditor has assented to it, so that it is not within the power of the assignor to recall or reverse it, or made to one who is a creditor, is not within the terms or operation of the Act, which is confined to *sales*, properly termed so; and to sales made to a person or persons not in the interest of or for the general creditors of the vendor.

Sales are not revocable, but they may be conditional, although they are not commonly made so. An assignment for the benefit of creditors is a trust conveyance, determinable in its nature on payment of the creditors; and the debtor is entitled to be revested with the whole of the estate he had assigned, upon the payment of his debts, and until the assignment has been closed he is interested as a *cestui que trust* in the property transferred and in its due administration.

There cannot be any two conveyances more dissimilar in their intent and operation than a sale such as the statute refers to, and an assignment made for the benefit of creditors. I am therefore clearly of opinion that an assignment made for creditors is not within the R. S. O. ch. 119.

O'CONNOR, J.—The first section of the R. S. O. ch. 119, sec. 1, provides that "Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, made in Ontario, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall, within five days * * be registered * * together with the affidavit of a witness thereto of the due execution * * and also with the affidavit of the mortgagee, or of one of several mortgagees, or of the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith and

is properly authorized in writing to take such mortgage (in which case a copy of such authority shall be registered therewith)."

Section 2. "Such last-mentioned affidavit, whether of the mortgagee or his agent, shall state that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith, and for the express purpose of securing the payment of money justly due, or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him."

Section 5. "Every sale of goods and chattels, not accompanied by an immediate delivery, and followed by an actual and continued change of possession * * shall be in writing * * and shall be accompanied by an affidavit of the due execution thereof, and an affidavit of the bargainee, or his agent duly authorized in writing to take such conveyance (a copy of which authority shall be attached to such conveyance), that the sale is *bond fide* and for good consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods," &c.

The first section merely applies to mortgages, or conveyances intended to operate as mortgages.

The second section requires that the affidavit state that mortgagor "is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, and that it was executed in good faith, and for the express purpose of securing the payment of money justly due or accruing due."

The fifth section as clearly applies only to sales of goods and chattels, speaks of bargainer and bargainee, correlative terms which are peculiarly applicable to a sale, which last word is itself a well defined legal term; and it requires that the affidavit state "that the sale is *bond fide* and for good consideration." The term "good considera-

tion" has also a well defined legal meaning, marked in the distinction between "a valuable consideration" and "a good consideration." This section, then, means and contemplates a *bona fide* bargain and sale of goods for a good consideration moving from the purchaser or bargainee to the seller or bargainer.

But this is the case of a dealer, who, being indebted to several different persons, makes a voluntary assignment of her goods and chattels to a person who is not a creditor, a person to whom the assignor is in no way indebted, but the assignment is made to him merely as a bare trustee (and a voluntary trustee at that) for the benefit of the creditors of the assignor. He cannot be called even an agent of the creditors, for the assignment appears to have been made by the assignor and accepted by the assignee without the knowledge of the creditors.

Under these circumstances I should say, without hesitation, that the transaction had no reference whatever to, and was not within the meaning or contemplation of, the Chattel Mortgage and Sales Act above referred to, were it not that in the head notes and digest of a number of cases decided in our Courts since 1851, an expression to the effect that a general assignment for the benefit of creditors is within the meaning of the Chattel Mortgage Act is frequently used, as if it was so decided in those cases. In other cases points respecting the description of the goods, the change of possession, or the sufficiency of affidavits, have from time to time been decided with reference to the provisions of the Act, in such a manner as to lead to the belief that the Courts treated assignments for the benefit of creditors, properly so designated, as within the meaning of the Act. But on a perusal of the cases I find that there is not one (at least I have not found one, though I have searched with some care) in which it has been held that an assignment such as the one now in question falls within the meaning of the present or any of the previous Acts which have been at any time in force in this Province respecting chattel mortgages or sales of chattels.

In every case the mortgagee or bargainee had an individual pecuniary interest, either in his own right or as the authorized agent of another in the transaction.

The most common cases have reference to chattel mortgages made to secure a debt due or accruing due to the mortgagee, or to secure him against some liability incurred on behalf of the mortgagor. In some cases the mortgages were made to a creditor for his benefit and that of the other creditors. In a few instances an assignment was made to one creditor to secure payment to him of his own debt, and then the debts of others who were also creditors of the assignor. Such assignments were regarded as partaking of the nature of mortgages or bills of sale according to their special circumstances, and were treated without question as if they were within the scope of the Act.

But in all the cases, the mortgagee, bargainee, or assignee, whichever he might be called, had a pecuniary interest as principal or agent in the transaction.

In this case the assignment is, in my opinion, of a nature entirely different from the quality of either of the instruments mentioned in and contemplated by the Act. It is, therefore not an instrument (neither a chattel mortgage within the meaning of section 1, nor a conveyance within the meaning of section 5) under the Act. This seems, in the absence of an insolvent law, to throw the assignment back on the law as it exists irrespective of the Act; and therefore the finding of the learned Judge, and the judgment rendered by him, must stand, because the deed was signed by an accepting creditor before the execution issued under which the seizure was made, and not being preferential or dilatory in its provisions, it places the goods just where they would be under the execution, and by force of the Statute of Ontario recently passed.

ARMOUR, J., concurred.

[QUEEN'S BENCH DIVISION.]

MACKEY V. SHERMAN ET AL.

Streams—Improvements on for floating timber—Right to the use of.

The plaintiff had erected dams, slides, and other improvements for facilitating the passage of saw logs and timber down a stream, floatable in a state of nature. Some of these slides were situated in the bed of the stream, others were built entirely on the plaintiff's land on one side of the stream, the water of which was dammed back so as to flow in part through the artificial channel thus constructed. The defendants in driving their logs and timber down the stream used all the slides and improvements. In an action for tolls for such user—

Held, following *Caldwell v. McLaren*, L. R. 9 App. Cas. 352, that as to all slides and improvements constructed in the bed of the stream plaintiff could not recover; but *Held*, also, as to all such improvements outside the channel, and upon plaintiff's land, that a recovery by the plaintiff was proper.

Held, also, that the absence of aprons of the proper statutable dimensions upon plaintiff's dams across the river afforded defendants no ground for claiming the right to use without compensation plaintiff's improvements not in the bed of the stream.

Boale v. Dickson, 13 C. P. 337, remarked upon.

STATEMENT of claim.

3. The plaintiff, long prior to the years 1883 and 1884, had been, and then was, and still is lawfully seised and possessed of lots 1 and 2, in Range C, and lots 1 and 2, in Range D, of the township of Collins, in the temporary judicial district of Nipissing, in Ontario, and of certain dams, slides, and other improvements built and placed by the plaintiff upon the said lands, and in and across the Amable du Fond River, which flows through and adjacent to said lands, to facilitate the passage and transmission of timber and saw logs down the said river, and then had and still has the right to collect and receive to his own use, from any and all persons using the said dams, slides, and improvements for the passage or transmission of timber or saw logs down the said river, a compensation or toll of three cents for each saw log, and \$2 for each crib of timber passed through and over the said dams, slides, and improvements, of which the defendants had notice.

4. During the spring and summer of the year 1883 the defendants passed 23,400 saw logs and 120 pieces, equal

to four cribs, of boom timber through and over the said dams, slides and improvements of the plaintiff; and in the spring and summer of 1884 the defendants passed 12,765 saw logs and 100 pieces, equal to four cribs, of boom timber over and through the said dams, slides, and improvements of the plaintiffs.

5. In the spring and summer of 1883, and of 1884, the defendants, with the plaintiff's permission, used certain dams, &c., of the plaintiff's, situated on and upon the river Amable du Fond, in the township of Collins aforesaid, erected and built by the plaintiff there, to facilitate the transmission of timber and saw logs down the said river in passing 250 pieces, equal to 8 cribs, of boom timber, and 37,000 saw logs of the defendants over and through the said dams, &c., of the plaintiff.

6. During 1883 the plaintiff sold and delivered to the defendants lumber, goods, and chattels to the amount of \$2.36.

7. The plaintiff delivered accounts of the said claims against the defendants, and they acknowledged the claim in the sixth paragraph to be correct.

8. Defendants have not paid.

9. The plaintiff claims \$1110.31, and interest.

Defence :

1. The defendants admit the 1st, 2nd, 6th, and 7th paragraphs to be correct.

2. The defendants deny the other paragraphs of the statement of claim.

3. The defendants say the Amable du Fond River in its natural state was, and always has been, a navigable river for the floating and passage of *saw logs*, and the defendants submit that they, in common with all others, are and always have been lawfully entitled to the free and unobstructed use of the waters of the said river, for the floating and passage of their saw logs down and along the same.

4. The same as the 3rd paragraph as to *boom timber*.

5. The said river is a stream down which all persons may float *saw logs* during the spring, summer, and autumn freshets without any improvements, and without the let or hindrance of the plaintiff, and without the payment to him of any tolls or charges.

6. The same as the 5th paragraph as to *boom timber*.

7. The dams, &c., of the plaintiff were not necessary to facilitate the floating of *saw logs* at the times of the spring, summer, and autumn freshets.

8. The same as the 7th paragraph as to boom timber.

9. If the plaintiff were seised and possessed of the lands, dams, &c., as alleged, which the defendants deny, and if the dams, &c., were, when constructed, necessary to facilitate the transmission of saw logs and boom timber down the river, which the defendants deny, the plaintiff had no right to collect tolls from the defendants, as alleged, because the dams, &c., were so badly constructed and damaged, and so much out of repair, that they obstructed the passage of saw logs and boom timber down the river.

10. If the plaintiff was entitled to collect toll, which the defendants deny, the toll was unreasonable and unauthorized by law.

11. Payment of the \$2.36 into Court.

12. Counter-claim : That the defendants are entitled to recover from the plaintiff damages for loss of time and expenses occasioned while floating their *saw logs* and *boom timber* down the said river by reason of the several matters set forth in the 7th, 8th, and 9th paragraphs of their statement of defence, and by reason of the wrongful and illegal obstructions occasioned by the said dam, &c., wrongfully placed by the plaintiff in the said river, or wrongfully allowed by him to become so out of repair as to obstruct the floating of the defendants' logs and boom timber, and for the injury thereby occasioned to the same in passing over and through the said dams, &c.

The defendants claimed \$1,000 damages.

Issue upon the statement of defence and counter-claim, except as to the 11th paragraph of the statement of defence,

and as to its acceptance of the \$2.36 in full satisfaction thereof.

The cause was tried at the last Fall Assizes, held at Pembroke before Cameron, C. J., without a jury.

The evidence shewed the Crown on the 27th of November, 1873, granted the lands in question to the plaintiff, at pleasure, at the yearly rent of \$1.

The lease recited that the plaintiff had expended \$10,000 in making dams and other improvements thereon, and on the river Amable du Fond, flowing through the land; and it gave power to the plaintiff to impose a tariff on all timber or logs passing through the said improvements, not to exceed \$2 per crib for square timber, and three cents for each log, subject to the approval of the Commissioner of Crown Lands.

Under this the plaintiff duly declared and published on the 26th of August, 1880, a tariff imposing \$2 on each crib of timber passing through his improvements, and three cents for each saw log passing through them; but timber and saw logs passing through less than all the dams and slides were to have paid upon them only a just proportion of the said rates.

The learned Chief Justice gave his judgment upon the evidence as follows:

CAMERON, C. J.—I am not able to distinguish the case in principle from those cases determined in the Courts of this Province awarding to persons floating logs and timber down streams, which are floatable or navigable, the right to remove obstructions found in such streams, whether put there by the owners of the bed of the stream for useful and beneficial purposes or not. Here the evidence preponderates to shew that the Amable du Fond was a floatable and navigable stream for logs before any improvements were made by the plaintiff, or any one else whose right he had acquired by the demise to him by the Crown under the patent put in evidence.

For square timber it was not floatable without such improvements made with a like object. It seems to me that if the defendant in this case had the right to remove

the dams constructed by the plaintiff to a sufficient extent to permit the free passage of the logs, he had equally a right to use any aids to such navigation that he found within the bed or water way of the river, to enable him to float his logs down.

Then, as to all the slides except the one at Big Chute or the long slide, the plaintiff cannot legally impose or exact tolls. The fact that the land on which the slides were erected still belonged to the Crown, subject to the demise to the plaintiff by the Crown, and the approval by the Commissioner of Crown Lands of the plaintiff's tariff, can make no difference, as the Act, ch. 115, R. S. O., applies to the Crown as well as to private parties. I am bound therefore to decide against the plaintiff in respect of the tolls for all the slides except the long slide. It was urged by Mr. Deacon, for the plaintiff, that the right to impose tolls for the use of improvements such as these made by the plaintiff was given under ch. 17 of 47 Vic. (Ont.) sec. 2. But the right under the section is confined to streams that were not navigable before such improvements were made, and if that Act did apply, before any charge could be legally made it would be necessary to establish the tolls to be charged in manner indicated by section 4 of the Act.

There still remains the question of the right of the plaintiff to remuneration for the use by the defendants of the long slide, which according to the evidence was wholly on the land of the plaintiff and outside of the bed or waterway of the river. I can see no good reason why the plaintiff should not be compensated for such use.

I am clearly of opinion the defendants knew the plaintiff expected to be paid toll for the use of the slides, and that they used the slides with such knowledge by the plaintiff's permission. Therefore, not having by law the right to take their timber through a slide constructed wholly upon the plaintiff's land, as they had through the slides constructed within the waterway of the river, they are responsible for and liable to pay to the plaintiff a reasonable compensation, which I find to be one cent per saw log, and sixty-six cents and two-thirds of a cent for a crib of square timber. The number of logs that were passed through the long slide in the years 1883 and 1884 was 24,900, and eight cribs of square timber, for which the plaintiff is entitled to recover \$254.33. The plaintiff is also entitled to an undisputed item of \$2.36, for goods sold

and delivered, mentioned in the 6th paragraph of the statement of claim.

I shall therefore direct judgment to be entered for the plaintiff for \$256.69, with full costs of suit.

The authorities on the subject of the right of persons floating timber and logs down streams in the province to remove obstructions will be found in the case of *McLaren v. Caldwell*, 6 A. R. 456, which affirms the principle of those authorities, and the judgment of the Court of Appeal was in *Caldwell v. McLaren*, on appeal to the Privy Council, affirmed : L. R. 9 App. Cas. 392. I refer to the language of Lord Justice Blackburn, at page 410, as to the effect of our Act, ch. 115, R. S. O. He says : "It is quite true that it is not to be presumed that the Legislature interferes with any man's private property without compensation. But if the whole stream is floatable during freshets, it cannot be doubted that the Legislature did mean, with the object of affording facility to lumberers to carry their timber to market, to say that they should have the right to float down these streams without obstruction by the owners of the bed of the river, without paying them anything."

This language seems to cover the plaintiff's claim, as I have said, in respect of the slides within the waterway, and warrant the conclusion at which I have arrived ; for it is clear from the evidence that the defendants could have got their logs over the dam at the said Big Chute, and there was no necessity for their resorting to the slide of the plaintiff, even if a necessity to do so would have made any difference.

The defendants' solicitors gave notice of motion to set aside the verdict or judgment entered herein for the plaintiff, and to have a verdict entered for the defendants ; or for a new trial ; or for such other order as upon the whole case the Court might consider the defendants to be entitled to.

At the last Hilary Sittings, *J. K. Kerr, Q. C., Walker*, with him, supported the motion. It may be said the defendant could still have used the dam without using the slide, but the plaintiff had placed a boom which kept the timber and logs from reaching the dam, and which led the logs, &c., into the slide. The defendant could

not have used the dam if there had been no boom leading to his slide, because the dam had not a proper apron, and the timber would have been injured: *Angell* on Water-courses, sec. 554. The evidence shews that since 1862 the river was floatable for saw logs. There was no proper apron at the dam. They cited 47 Vic. ch. 17, O.; R. S. O. ch. 115; *McLaren v. Caldwell*, 6 A. R. 456, S. C. L. R. 9 App. Cas. 392-410; *Dwinel v. Veazie* 44 Maine 167-176; *Veazie v. Dwinel*, 50 Maine 479-494; *Dwinel v. Barnard*, 28 Maine 554-561; *Brown v. Chadbourne*, 31 Maine 9; *Davis v. Winslow Manufacturing Co.*, 51 Maine 264; *Holden v. Robinson*, 65 Maine 215; *Brown v. Watson*, 47 Maine 161.

Aylesworth, contra. The defendants contend the plaintiff changed the course of the river. The plaintiff's slide takes merely a portion of the river, and leaves quite enough water in the river to enable the defendant to take his logs over the dam. No harm is done to the logs, &c., going over the dam, and there is plenty of water to carry them over. The harm done to them is in and among the rocks, 100 feet below the dam. The defendants took nearly 13,000 logs over the dam in 1885, and only about 1,500 went through the slide. In 1883 the defendants' whole drive went through the slide. The defendants could have swung the boom leading to the slide easily, and so have taken their logs by the dam. The want of an apron, if there be such a want, makes no difference, for logs go over it as it is without any difficulty. There is a depth of water under the dam of 13 feet. There was no occasion for the defendants to use the plaintiff's works. He referred to R. S. O. 115; *McLaren v. Buck*, 26 C. P. 539; *Regina v. Mille*, 17 C. P. 654; *Henley v. Mayor and Burgesses of Lyme Regis*, 5 Bing. 91, S. C. in Error, 3 B & Ad. 877, and in House of Lords, 1 Bing. N. C. 222.

March 7, 1885.—WILSON, C. J.—It will be observed the learned Chief Justice decided the plaintiff, on the authority of *Caldwell v. McLaren*, in the Privy Council, L. R. 9 App.

392, was not entitled to the user by the defendants of any of the plaintiff's improvements made within the banks of the river, but that he was entitled to recover for the use of the slide at the Big Chute, because that was a work and construction made by the plaintiff outside of the river way altogether, and upon the land which the plaintiff has leased from the Crown, and which is to the extent of his interest as such lessee the plaintiff's own private property.

The defendants say they should not pay for the use of that slide, because, although it is upon the plaintiff's property, and although they could have passed their logs and timber over the dam just above the Chute, that the plaintiff by placing a leading boom above the dam there which led the logs and timber as they floated down the river away from the dam over which their logs and timber could have passed into and along by the Chute below the dam, had led the defendants' logs and timber into the long slide upon the plaintiff's land; and as the plaintiff had obstructed the river by that leading boom, the defendants were not compelled to remove the boom and keep their logs and timber from going into the slide, and they should not therefore be compelled to pay for the use of the slide in such a case.

The plaintiff says these leading booms are easily opened and turned aside when any one desires to make use of the natural channel of such rivers or streams; and it appears it is the custom to do so, and that during the floating or driving season such leading booms are not considered to be obstructions to the free use of the natural channel.

There is no doubt the defendants deliberately used the slide, and purposely did not swing the boom, because they desired to use it, and did not desire nor intend to use the natural channel of the river. In such a case the learned Chief Justice might well find that the use of the slide by the defendants, under such circumstances, was a voluntary use by them of the slide, and a use of it by them under the old terms of paying for the use of it. But because the

late decision of the Privy Council has exempted the defendants by law from payment for the use of improvements made in floatable streams, there is no reason why they should not still pay for the use of improvements made beyond the limits or banks of the stream upon private property, if in law they are subject to make such payment.

Is there anything in the statutes or in the decisions which prevents the plaintiff from recovering for the use of the slide at the Big Chute, which is constructed wholly upon his private land, and not within the channel of the river, there being sufficient water left in the river to enable floatage to be carried conveniently on in all respects, notwithstanding the quantity of water abstracted from it by this long slide?

The learned Chief Justice found that the dams the plaintiff had constructed in the river were not provided with aprons of the proper statutable dimensions, but the defendants, it appeared, could still float their logs and timber over the dams, although not perhaps with the same benefit to their logs and timber if there had been the proper aprons to the dams.

But in my opinion the want of the sufficient aprons was not relied upon by the defendants as the reason why they used the slide in question, their only reason for using it being, as they said, because the leading boom above the dam led their logs and timber into the slide, instead of leading them to the dam, and upon that point I have already stated my opinion.

The R. S. O. ch. 113 applies in its general provisions only to *mill* dams. Now, at the dam above the big chute there is no mill, the mill, according to the plans filed, being at the chute below the big chute, and with respect to such lower chute no question arises, for no charge was made for its use, and the slide at that chute was not used for saw logs, but for timber only.

The R. S. O., ch. 115, sec. 2, mentions "any *such* dam," without saying what dam the *such* refers to. If it have an application to anything it can only be to the words in sec.

1, "by felling trees or placing *any other obstruction* in or across any such stream, prevent the passage thereof."

Then sec. 2 enacts that "in case there is *a convenient apron, slide, gate, &c.*, in any such dam or other structure made for the passage of saw logs, &c., no person using any such stream in manner and for the purpose aforesaid shall alter, injure, &c., any such dam or other useful erection in or upon the bed of or across the stream," &c.

It may be a *convenient apron* is required in every dam in a stream floatable for saw logs, &c., but if so the want of that apron, as already stated, was not complained of, and although at the most the defendants might have removed so much of it, that is, the leading boom, as to give them the use of the stream in its natural state, it did not authorize them to use the slide on the plaintiff's own private ground.

In the case of *Boale v. Dickson*, 13 C. P. 337, the judgment was prepared by Draper, C. J., while he was Chief Justice of the Common Pleas. That judgment he transferred to his successor, Richards, C. J., and the parties accepted that judgment as the judgment in the cause; but I do not understand that the Judges of the Court, who were the Judges of it when the judgment was read, delivered it as their judgment. Speaking for myself, I should not have given judgment in any case without having heard the argument in it. I had no part in it, and if the parties were willing to take it as the judgment which was to regulate their rights, they had a perfect right to do so. The parties adopted it as the judgment *in the case*, but not as the judgment of the Judges who were then in the Court, and who had never heard of it.

It is useless to follow either the case of *Boale v. Dickson* or *McLaren v. Caldwell*. The last case finally, in L. R. 9 App. Cas. 392, determined the rights of the parties to use such streams.

That Court of the last resort has determined that *all streams*, in or over any part of which logs, &c., are floatable, can be used for that purpose under our legislation, during the spring, summer, and autumn freshets, as well such

streams in their natural state as such streams made floatable by the personal expenditure and improvements of others, without making compensation for the use of such improvements, in like manner as those parts of the stream which in their natural state can be used ; and at all other seasons of the year by law, although not by authority of our Legislature.

That decision has gone quite far enough. It does not warrant the use of the slide the plaintiff has constructed on his own land and not in or across the stream, and which slide has nothing more to do properly with the general uses of the stream than if the plaintiff had diverted the water passing through the slide to the driving of a mill placed where that slide is, or at a considerable distance from it.

I agree with the opinion, finding, and judgment of the learned Chief Justice, and that the motion of the defendants should therefore be dismissed, with costs.

ARMOUR and O'CONNOR, JJ., concurred.

Order accordingly.

(QUEEN'S BENCH DIVISION.)

MARRIN v. GRAVER.

Landlord and tenant—Refusal by landlord to give possession—Measure of damages.

Action by a tenant against his landlord for refusing to give him possession of the demised premises.

Held (WILSON, C. J., dissenting), that the proper measure of damages in such a case is the difference between what the tenant agreed to pay for the premises and what they were really worth. But it is not open to the tenant to shew that he rented the premises for the purpose of there carrying on a certain business, of which the landlord was aware, that he could not procure other premises, and to claim the profits which he might have made in such business if he had been let into possession.

Ward v. Smith, 11 Price 19, not followed; *Jacques v. Millar*, 6 Ch. D. 153, commented upon.

ACTION for not giving possession of premises in Barrie, agreed verbally to be let for one year; and also for slander. The only statement of damage was that, at the close of the slander charge, that is, at the conclusion of the statement of claim, it was alleged, "by reason of the premises the plaintiff was greatly injured in his credit and reputation and suffered great loss and damage. The plaintiff claims \$1000 damages."

The cause was tried before Armour, J., and the action was dismissed, with costs.

Pepler obtained an order *nisi* to set aside the dismissal of the action, and for a new trial, as it had been improperly ruled that the damages were too remote.

February 3, 1885. *Pepler* supported the order *nisi*. The action should not have been dismissed. The Judge decided all the plaintiff could claim for damages was the difference between what he was paying and what the premises were really worth; and as no evidence of that kind was given the action was dismissed. He cited *Engel v. Fitch*, L. R. 3 Q. B. 314, L. R. 4 Q. B. 659; *Godwin v. Francis*, L. R. 5 C. P. 295, and cases there cited; *McMahon v. Field*, 7 Q. B. D. 591; *Jacques v. Miller*, 6 Ch. D. 153;

Strutt v. Farlar, 16 M. & W. 249 ; *Woodf. L. & T.*, 10th ed., 754. There should be a new trial.

Marsh, contra, commented on *Jacques v. Miller*, 6 Ch. D. 153, and also referred to *Engel v. Fitch*, L. R. 4 Q. B. 659, and other cases cited ; *Symons v. Patchett*, 7 E. & B. 568 : *Treadgar Iron Works Co. v. Guilged*, 1 Cabb. & El. N. P. R. 27 ; *Stroud v. Austin*, *Ib.* 119 ; *Mayne*, 3rd. 44, 45 ; *Locke v. Furze*, 19 C. B. N. S. 96.

March 7, 1885. WILSON, C. J.—The case was argued altogether upon the point, whether upon the evidence the plaintiff had proved a case for substantial damages.

We had discussed the question before the argument whether a writing was not required under the Statute of Frauds to support the claim, but we thought the case of *Coe v. Clay*, 5 Bing. 440, speaking of it merely from memory, was an authority in support of the action.

Since looking at the cases it is quite settled that although the parol bargain creates a valid *interesse termini*, it does not entitle the person having such an interest to maintain an action in respect of it. The case of *Edy v. Strafford*, 1 Tyr. 295-301, is in point, and also *Moore v. Kay*, 5 A. R. 261.

The defendant has not pleaded the Statute of Frauds as a defence.

The question, then, before us is, whether the plaintiff proved a case for damages. The learned Judge ruled that the plaintiff could recover only the difference between what he was to pay for these premises and what they were really worth. The counsel for the plaintiff contended they were at liberty to shew they could not procure other business premises in the town, and that the plaintiff had lost the profits of the business he would have made if he had got possession of the business stand which he had bargained for.

The case of *Engel v. Fitch*, L. R. 3 Q. B. 314, was that the plaintiff bought a house, and was to have had possession on completion of the purchase. The purchase was com-

pleted. He required possession, which the vendors could not give, as the mortgagor was in possession and would not leave, and the vendors would not eject him: Held, the plaintiff was entitled to recover \$105 damages, being the profit he would have made on a contract he had entered into with a third person for a sale to him, and also his deposit and the expenses of investigating the title.

There can be no doubt in that case that these items constituted the proper measure of damages.

In *Strutt v. Farlar*, 16 M. & W. 249, the plaintiff had recovered judgment against one Farlar—not the defendant—for £281 3s. 6d. The plaintiff agreed with the defendant not to sue out execution against the judgment debtor until a certain day, and the defendant promised the plaintiff that she, the defendant, would build and finish a good and substantial house, and would cause a lease to be granted to the plaintiff of the same, and if the defendant performed what she had promised the same should be accepted by the plaintiff in satisfaction of the said judgment. Action for not building the house, &c. The jury gave damages to the amount of the judgment debt. The plaintiff moved against the assessment, contending the true measure of damages was the difference between the amount of the judgment and the value of the house; but the Court decided the true amount was the value of the judgment, because the defendant had agreed to become responsible for that amount, for as soon as the defendant paid the damages the plaintiff would be bound to enter up satisfaction on the judgment. The contract was a mere forbearance to sue out execution. The defendant did not make a purchase of the judgment.

In *Godwin v. Francis*, L. R. 5 C. P. 295, the plaintiff was allowed to recover his costs for investigating the title, and also the costs of proceedings taken against the defendant and four others, whom the defendant assumed he had the right to bind down to the time the plaintiff discovered the defendant had not the power to bind such others, and the difference between the contract price of the property and the

market price, but not his loss on a resale of horses, &c., bought by him to stock the land, as he had these article before the title had been investigated or possession given, and the defendant was not bound to expect the plaintiff would have purchased them.

In the case of *Ward v. Smith*, 11 Pr. 19, the agreement to let between the parties was as follows :

"J. F. Smith agrees to let part of his house, consisting of the first and second floors, with the use of the small shop-window and large attic, and the large kitchen, at the sum of 75 guineas per annum, the rent to commence at the time possession is taken."

The plaintiff proved at the trial "that the premises, which were in Argent street, and had been taken for the purpose of his wife's business, who was a milliner, were advantageously situated, and conveniently adapted for that trade, and that by not being suffered to occupy them the defendant had sustained considerable loss from the passing by of a profitable part of the year for such business."

The Court afterwards sustained the damages found, which were assessed at \$50, which were said to be very reasonable.

The allegation of damage in that case was, "whereby the plaintiff had sustained loss, and been obliged to hire other premises at great cost and expense for rent and charges."

It was objected that special damage had not been laid in the declaration.

The Lord Chief Baron said : "As to the objection of evidence of special damage having been admitted, there was in fact no special damage, as such, proved. The object of the witnesses' testimony was to shew that the plaintiff had sustained inconvenience." Graham, B., said : "It appears no special damage was given in evidence. Loss of customers and general damage occasioned thereby, however, may have been given in evidence under this declaration, for it charges general loss without specifying any particular individuals whose custom had been lost, and it was

competent to the plaintiff to shew certain damage sustained by the breach of the agreement, without stating his loss more specially in the declaration."

In *Jaques v. Millar*, 6 Ch. D. 153, the plaintiff agreed with the defendant to take a lease of premises of the defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In consequence of the defendant's wilful refusal to fulfil his agreement, the plaintiff was unable for fifteen weeks to commence his trade: Held, in addition to judgment for specific performance of the agreement, damages must be awarded in respect of the plaintiffs' loss of profits from his trade during the fifteen weeks, and £250 damages were awarded. The claim to damages was very fully discussed in that case, and Fry, J., said: "I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in contemplation of the parties as likely to arise from the partial breach of the contract."

In *Wilson v. Northampton and Banbury Junction R. W. Co.*, 9 Ch. 279, a railway company for valuable consideration with a landowner agreed to erect, &c., a station on land which they had bought from him. The company did not do so, but put up one two miles away. Held, damages rather than specific performance would better meet the justice of the case.

The Lord Chancellor said, on appeal, by giving damages "the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in Courts, both of law and equity, against persons who are wrong doers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim that on assessing damages every reasonable presumption may be made as to the benefit which the other party might have obtained by the *bona fide* performance of the agreement." And he states, at p. 286, what circumstances a jury in such a case might take into

consideration in assessing their damages, which appear to me to cover the damages which the plaintiff claims in this action.

These cases shew the plaintiff was entitled to give evidence of the loss he had sustained by not getting the particular premises he had bargained for ; by not having had the opportunity of selling his goods ; and by the loss of profits upon such sales, and the like; as it is quite clear the defendant knew the purpose for which the plaintiff wanted the premises, and that there would be a loss sustained if the plaintiff were prevented from carrying on his business.

Whether the damage should be more specifically stated than the plaintiff has stated it may be questioned.

The allegation at the close of the slander count that "by reason of the *premises* he was greatly injured in his credit and reputation, and suffered great loss and damage," appears to me strictly to be confined to the slander charge ; for I do not know how he could properly be said to have been injured "in his credit and reputation" by not getting possession of the property which was promised to him.

If that be so, the plaintiff has laid no damage for not getting possession of the house property. He merely *claims* for all his wrongs \$1,000.

The word *premises*, however, is a very flexible word, and may, to sustain the action, be held to apply to the whole of the statement of claim.

In that case the items of damages claimed by the plaintiff seem to be recoverable under that general allegation of damage. The claim of damage was as general in *Ward v. Smith*, 11 Pr. 19, and it is approved of in *Mayne* on Damages, 2nd ed, p. 421. The rule may be said to be "a mere general loss may well be announced in the same general way as that in which it can alone be approved:" *Mayne* 421.

As the defendant has not pleaded the Statute of Frauds the action is maintainable ; and as the plaintiff proved the contract as alleged, he was entitled to give evidence of the special matters he proposed to go into evidence of

at the trial on general principles, as well as under the general allegation of damage stated in the pleadings.

The rule must, therefore, be made absolute.

ARMOUR, J.—Sometime in July, 1884, according to the plaintiff's account, he agreed with the defendant for the lease of a store for one year, at the rental of \$240 payable quarterly, the term to commence on the 6th of August, before which day the defendant informed him that he had leased the store to another man; and for this breach of his agreement the plaintiff brought this action against the defendant. The case was tried before me at Barrie. The plaintiff swore that he calculated to go into business, and desired to shew as damages for the breach of this agreement the profits he would have made in that business during the term. This I refused to allow, as the damages were, in my opinion, too remote, and he being unable to shew any other damages, I dismissed the action.

The case of *Ward v. Smith*, 11 Price 19, was relied upon at the trial in support of his claim for loss of profits in the business, which he calculated to carry on in the premises agreed to be leased. That case cannot be said to be an authority now: it was decided more than thirty years before the case of *Hadley v. Baxendale*, 9 Ex. 341, in which after great and mature consideration the Court laid down the rule which has been acted upon ever since, both in England and the United States, that "when two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." Now, how can the loss of profits which the plaintiff might have made on the sale of goods which he intended to sell on the premises be said to be damages

either arising naturally from the breach of the contract to lease the said premises, or which might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach? The plaintiff was not at the time in the business which he calculated to carry on, nor had he contracted for the goods which he calculated to sell on the premises. If the defendant had, as well as contracting for the lease of the premises to the plaintiff, also contracted for the sale to him of the goods to be sold therein, and had broken both contracts, this anomaly would arise—that for the breach of the contract for the sale of the goods he could not recover the profit which he might have made from the sale of them, but only the difference between what he was to pay the defendant for the goods and the market price of the goods; but on the breach of the contract to lease he could recover the profit he might have made on the sale of these goods. Would this be because the loss of the profits which he might have made on the sale of the goods in the premises would more naturally arise from the breach of the contract to lease the premises, than it would from the breach of the contract to sell the goods; or because such loss of profits might be more reasonably supposed to have been in the contemplation of both parties at the time they made the contract for leasing the premises than at the time they made the contract for the sale of the goods?

No case in England since *Hadley v. Baxendale* supports such a claim for damages as the present.

I would have allowed evidence that the plaintiff had agreed to assign or sub-let the premises at an advance over what he was to pay for them, or that they were worth more than what he was to pay for them; but no such evidence could be given; and *Engel v. Fitch*, L. R. 3 Q. B. 314, L. R. 4 Q. B. 659, so far from being an authority for the plaintiff, is an authority for the view I took at the trial.

Godwin v. Francis, L. R. 5 C. P. 295, does not support the plaintiff's contention. Montague Smith, J., says: "Sup-

posing nothing had passed between the plaintiff and defendant on the subject of stocking the farms" (and nothing passed in this case between the plaintiff and defendant on the subject of stocking the store), "these damages would clearly have been too remote." The seller of a farm would know that the farm would be stocked. The lessor of a store would know that the store would be stocked, but that is not sufficient to make the breaker of the contract answerable for the loss of the profits which might have been made in carrying on the business of the farm or store. See judgments of Willes, J., in *British Columbia, &c. Saw-mill Co. v. Nettleship*, L. R. 3 C. P. 449, and in *Horne v. Midland Railway Co.*, L. R. 7 C. P. 591. If the plaintiff had bought goods for the store, which, by reason of the breach by the defendant of his contract, he was obliged to sell again at a loss, this case would more resemble *Godwin v. Francis* than it does.

In the case of *Jaques v. Millar*, L. R. 6 Ch. D. 153, the head note is misleading and erroneous. The action was for specific performance of an agreement for a lease and for damages for delay in preformance. The plaintiff deposed that he agreed to take the premises for the purpose of carrying on there the business of an oil refiner, and that this intention was known to the defendant. The plaintiff said that he could have turned out fifty tons of oil per week : that there was an ample market for the sale of the oil, and that he could have made £50 per week : that it was fifteen weeks before he could get other premises to carry on his business, and that his loss was £750. Fry, J., said: "The question of damages is a more difficult one. Damages are claimed in addition to the specific performance of the agreement in respect of the delay which was caused by the defendant's wilful refusal to perform his contract, and the consequent loss of profit to the plaintiff. I think I am at liberty to consider what would have been the value of the possession of the premises to the plaintiff for the period between the 5th of September, 1876, and the time when he actually obtained possession of other prem-

ises. I shall not attempt to explain in detail the motives which operate on my mind. But I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract. Applying these tests I assess the damages at £250."

It will be observed that Mr. Justice Fry (who is an Equity Judge) did not base the damages upon the loss of profits in the business which the plaintiff intended to carry on, but on the value of the premises to him; and he recognizes the rule in *Hadley v. Baxendale* as binding in such a case, and assesses the damages subject to that rule, but is careful not to attempt to explain in detail the motives which operated on his mind.

That case therefore is not an authority that loss of profits in the business intended to be carried on in the premises is recoverable as damage for the breach of an agreement to lease the premises, but it is an authority that the rule in *Hadley v. Baxendale* is to govern in such a case.

I refer to *Lock v. Furze*, 19 C. B. N. S. 96; *Sikes v. Wild*, 1 B. & S. 587; *Bain v. Fothergill*, L. R. 6 Ex. 59, S. C. L. R. 7 H. L. 158.

In the United States the rule is well established that such loss of profits cannot be recovered for such a breach of contract.

In *Giles v. O'Toole*, 4 Barb. 261, the Court said: "I do not doubt the right of the plaintiff to recover the damages arising from expenses incurred in preparing to remove to and occupy the premises in question, together with the difference between the real value of the rent and the contract price. But the founding of a claim to damages on the part of the plaintiff upon proof of what her profits would be in the millinery business, and of proving those damages by the opinion of witnesses, is sanctioned by no authority, and is adopting a rule which is disapproved and

condemned in 17 Wend. 161; 23 Id. 431; 24 Id. 668, and 5 Hill 603."

In *Green v. Williams*, 45 Ill. 206, the Court said: "The plaintiff is also entitled to recover all expenses necessarily incurred by her in consequence of the defendant's refusal to give possession, but she is not entitled to recover profits that she might have made by conducting her business on the demised premises. Such damages are remote, speculative, and incapable of ascertainment."

I refer also to *Olmstead v. Burke*, 25 Ill. 86; *Rhodes v. Baird*, 16 Ohio, 573; *Sedgwick on Damages*, 140, 152; *Sutherland on Damages*, Vol. I, p. 110, 113, Vol. III. 149-162.

In my opinion the order *nisi* should be discharged, with costs.

O'CONNOR, J.—In *Mayne on Damages*, 3rd ed., p. 47, the rule regarding damages in cases of this kind is stated in effect, thus: "Was the matter in respect of which damages are claimed of such an ascertainable value, at the time of entering into the contract, as to have been capable of contemplation by both parties?" And at page 39: "The damages must be such, in cases of contract, as appear to have been contemplated by both parties, and is the natural and reasonable result of the defendant's act; that is, the result of the breach of the contract by the defendant."

Commenting on the case of *Watson v. Ambergate, &c.*, R. W. Co., 15 Jur. 448, Mayne says, at page 47, in substance, was the chance of the plaintiff to make profits by the use of the store of such an ascertainable value at the time of entering into the contract as to have been capable of contemplation by both parties?

If it was not ascertainable, then it is difficult to see how it could have formed part of the contract, and if it did not form part of the contract it could not enter into the damages for breach. This seems a plain, clear, explicit rule.

In this case it does not appear that the plaintiff was engaged in any business in the conduct of which he was

impeded or injured, or which he was compelled to abandon temporarily or permanently, for want of the store and premises which the defendant had agreed to let or lease to him ; nor does it appear that he had or possessed any goods wherewith to stock the store and carry on business ; or that he had bargained for or engaged any goods for that or any purpose ; or that he had entered into any contract or engagement for the sale of goods on commission, or otherwise, to others, and that for want of the store he was unable to fulfil contracts or engagements. No evidence of that kind was tendered. The only evidence tendered and rejected was general evidence that the plaintiff could not procure other premises suitable for his contemplated business in the same town, and mere opinion, evidence of a speculative kind, to shew what the probable profits of the business which he intended to carry on would be during the year for which he had engaged the store, which his counsel contended ought to be the measure of damages. I am, unhesitatingly of opinion that such evidence was inadmissible, and that it was properly rejected by the learned Judge.

Horne et al. v. Midland R. W. Co., L. R. 8 C. P. 131, is a strong case against the plaintiff's contention. Shortly stated it was this. The plaintiffs, being shoe manufacturers at Kettering, were under contract to supply a quantity of military shoes to a firm in London for the use of the French army, at 4*s.* per pair, an unusually high price.

The shoes were to be delivered by the 3rd of February, 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London, in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master (which for the purposes of the case was assumed to be notice to the company) at the time that the plaintiffs were under contract to deliver the shoes by the 3rd, and that unless they were so delivered they would be thrown on their hands.

The shoes were not delivered in London till the 4th, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2s. 9d. a pair, which, in consequence of the cessation of the French war, was, apart from the contract, the best price that could be obtained for them.

The defendants paid into Court a sum sufficient to cover any ordinary loss, but the plaintiffs further claimed £267 3s. 9d., the difference between the price at which they had contracted to sell the shoes, and the price which they ultimately fetched.

It was held that the plaintiffs could not recover the last mentioned sum, the damage not being such as might reasonably be considered as arising naturally from the defendants' breach of contract, or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract.

Hadley v. Baxendale, 9 Ex. 341, was discussed, and accepted as authoritative.

Burton v. Pinkerton, L. R. 2 Ex. 340, is another case where the whole subject of consequential damages is considered, and wherein the Judges, there being a difference of opinion, gave judgments *seriatim*; and adopting the same rule as was followed in the foregoing case, a new trial was granted because the jury had allowed damages similar in their character to those which were claimed but disallowed in the case above referred to, and which in this latter case were considered too remote.

Both these cases appear to me incomparably stronger for the plaintiffs than the present one.

The cases of *Engel v. Fitch*, L. R. 3 Q. B. 314, and *Strutt v. Farlar*, 16 M. & W. 249, are to my mind clearly distinguishable from this case, and are authorities conversely opposed to the plaintiff's contention, and support the Judge's view expressed at the trial.

In the former case the plaintiff had resold the property to another person at an advance on his own purchase price, being so much profit, reduced to certainty, and the loss of

that bargain naturally resulted in the loss to the plaintiff of the profit which his bargain had secured to him, if the plaintiff's default had not hindered it. In the latter case the plaintiff performed his part of the contract, and in consequence of the delay stipulated for and given the plaintiff had jeopardized his interest, and was likely to lose his judgment, which the defendant had agreed to purchase by giving the lease contracted for. As the house was not built the lease could not be given, and it was held that the plaintiff ought to recover the value of the lease as damages, and that the amount of the judgment was the proper measure of that damage.

On a review of the cases cited on the argument, and of others which have come in my way, I think the evidence tendered respecting damage was properly rejected, the evidence so tendered being too remote and entirely speculative; but I think the plaintiff was entitled to a verdict for nominal damages for the undoubted breach of contract. However, that would be of no benefit to the plaintiff, as he could not get costs. The finding, then, may as well stand.

The motion will be dismissed, with costs.

Order nisi discharged, with costs.

[COMMON PLEAS DIVISION.]

MACDONELL V. ROBINSON.

Libel—Defence, sufficiency of—Demurrer.

Action against defendant for a libel on the plaintiff published in a newspaper, with regard to his conduct as a barrister and solicitor. The defence set up was, that the plaintiff had, for some time prior to the alleged defamatory publication, addressed open letters to the public through the public press, and had invited public attention to his (the plaintiff's) character and position as a solicitor and barrister, and had challenged public criticism upon his conduct in connection with the subject matters referred to in the said article, and such criticism so invited had been made in various newspaper articles and letters and correspondence from time to time immediately prior to the said article, and such article was a moderate expression of opinion thereupon, and in no way damaged the plaintiff: and the defendant further said that the alleged libel and words were and formed part of an article printed and published in the said newspaper, and which said article was a fair and *bona fide* comment upon a matter of public and general interest, and it was printed and published *bona fide* and for the benefit of the public, and not otherwise, and without any malicious intent or motive.

Held, on demurrer, a good defence.

STATEMENT OF CLAIM.

1. The plaintiff is and was at the times hereinafter mentioned a barrister and solicitor of the Province of Ontario, duly called and admitted, and was and is practising as such barrister and solicitor in the city of Toronto.

2. The defendant was at the time of the publication hereinafter mentioned the proprietor, printer, and publisher of the newspaper or journal called *The Week*, the publishing office of which was at the time aforesaid at the said city of Toronto.

3. The defendant in his said paper or journal called *The Week*, dated on the 12th day of June, 1884, wrote, printed, and published of the plaintiff the words following, that is to say: (stating the libel set out in the judgment).

Meaning thereby that the plaintiff had been guilty of ungentlemanly, unprofessional, and improper conduct, and had been habitually guilty of conduct unbecoming a barrister and solicitor, and had misconducted himself in his calling and profession as such barrister and solicitor as

aforesaid, and was unfit to continue in the said profession or to have his name continued upon the rolls of the Law Society.

4. The words set out in paragraph 3 were written, printed and published by the defendants of and concerning the plaintiff, and were so written, printed, and published, falsely and maliciously, and with a libellous and defamatory sense and meaning.

5. The said words so set forth in paragraph 3 were also so falsely and maliciously written, printed and published, of and concerning the plaintiff in his profession and calling of a barrister and solicitor.

6. Whereby the plaintiff has been and is greatly injured in his credit and reputation, and in his said character and profession as a barrister and solicitor as aforesaid, and has been brought into public scandal, ridicule, and contempt.

And the plaintiff claims \$10,000 damages.

STATEMENT OF DEFENCE.

1. The defendant does not admit the allegations in the statement of claim.

2. The defendant wholly denies that the said words in the third paragraph of the statement of claim were printed of the plaintiff and of his conduct as a barrister and solicitor with the meaning specially and respectively alleged in the third, fourth, and fifth paragraphs of the statement of the claim, or with any defamatory meaning.

The third and fourth paragraphs are set out in the judgment.

DEMURRER.

The plaintiff demurs to the third and fourth paragraphs of the defendant's statement of defence, and says that the same is bad in law, on the ground that it affords no answer to the statement of claim, and, while it admits the publication, it does not shew any facts warranting the publication of the libel complained of; and on other grounds sufficient in law to sustain this demurrer.

On the 2nd day of December, 1884, the demurrer was argued.

Falconbridge, for the plaintiff.

Nesbitt, for the defendant.

The argument and cases cited sufficiently appear from the judgment.

December 9, 1884. ROSE, J.—This is a demurrer to the third and fourth paragraphs of the statement of defence.

The order of the paragraphs, by consent of counsel, is to be taken as reversed, and the fourth paragraph is to be read as part of the third, setting out matters of fact upon which the third is founded.

The libel complained of is in the following words: "As might have been expected from the record of the accuser (plaintiff), Mr. S. H. Blake has been triumphantly acquitted by the Law Society of the charges brought against him by Mr. J. A. Macdonell. It will be remembered that the hare-brained complainant, who has earned a most unenviable notoriety in connection with several shady semi-political transactions, categorically charged Mr. Blake with unprofessional behaviour. This accusation, which the Law Society found utterly groundless, becomes all the more contemptible since it was an attempt to injure Mr. Edward Blake through the reputation of his brother. Both these gentlemen, however, would have treated the affair with the silent scorn it deserved, but the Law Society very properly demanded that the slander should be made good. His utter failure to do this adds one more to the many reasons why a name redolent of so much ungentlemanly and questionable conduct should no longer remain on the Rolls."

The defence demurred to is as follows: 4. "The defendant further says, that the plaintiff had, for some time prior to the alleged defamatory publication, addressed open letters to the public through the medium of the public press, and had invited public attention to his (the plaintiff's) character and position as a solicitor and barrister, and had challenged public criticism upon his conduct in connection with the subject matters referred to in the said article, and such criticism, invited by the plaintiff, had been made and had

in various newspaper articles, and letters and correspondence published from time to time immediately prior to the said article; and such article was a moderate expression of opinion thereupon, and in no way damified the plaintiff as a barrister and solicitor.

3. The defendant further says that the alleged libels and words were and formed part of an article printed and published in the said newspaper called *The Week*, and which said article was a fair and *bona fide* comment upon a matter of public and general interest, and it was printed and published *bona fide* and for the benefit of the public, and not otherwise, and without any malicious intent or motive whatever."

The plaintiff contends that upon reading the libel (I have omitted the innuendos in each case) I should determine that it, in effect, shews that the defence is untrue, and that if the matter was before a jury the presiding Judge must rule that the statements in the article complained of clearly and irrebutably shewed that the article was not a moderate expression of opinion, and a fair and *bona fide* comment upon a matter of public and general interest, and published without malice.

If the plaintiff's contention is entitled to prevail, and it ought to be held, in the language of Wilson, C. J., in *Farmer v. Hamilton Tribune Printing and Publishing Co.*, 3 O. R. 538, at p. 540, that "it was in no sense for the public benefit, nor in the course of the defendants' duty as journalists to publish such matters," then it seems to me the plaintiff was quite right in applying, as he did, to the learned Master in Chambers to strike out the defence. Evidently the learned Master was not of the plaintiff's view, for he refused to strike out the paragraphs complained of. He, however, gave leave to reply and demur, and thus the case is properly before me on demurrer.

It must be admitted that the statement of defence, if true, is sufficient in law to afford a defence.

Then can I say, taking the statements of fact as facts, that there is no defence, on the ground that it sufficiently

appears on the record that the article complained of was written for a purpose and with an effect quite different from that alleged by the defendant ?

Am I able to say, without seeing the letters, that the article complained of was a malicious personal attack uninvited, unchallenged, unwarranted by anything the plaintiff has written ?

Further, am I able to say that these paragraphs in the statement of defence do not set out on the record allegations of facts which the defendant may offer in evidence as shewing that the plaintiff having written the letters complained of, even if entitled to a verdict, is only entitled to nominal damages ?

I must take it as admitted by the plaintiff that by open letters to the public press the plaintiff, prior to the article complained of, invited public attention to his character and position as a solicitor and barrister, and challenged public criticism upon his conduct *in connection with the subject matters, i. e., each and every of the subject matters referred to in the said article.* If so, how can I, by reading the article, say that he has not done so, and if he has how can I say that the article is not a fair and *bona fide* comment upon such matters. The questions of fact and law are for the jury. It may be that when the plaintiff's letters are produced, the defence will be shewn to be only good pleading, unsupported by evidence.

Is it not a question of fact rather than of law ?

The case of *Odger v. Mortimer*, 28 L. T. N. S. 462, is a strong case in the defendant's favour. There, a verdict for defendant was upheld when the plaintiff, a public man, was charged with being "a demagogue of the lowest type, half booby and half humbug, a political cheap jack, who would be a political sharper if he had brains enough."

I have examined the cases referred to of *Farmer v. Hamilton Tribune Printing and Publishing Co.*, 3 O. R. 538; *Scott v. Sampson*, 8 Q. B. D. 491; *Murphy v. Halpin*, 8 Ir. C. L. R. 127 (1875); *Koenig v. Ritchie*, 3 F. & F. 413; *Cox v. Feeney*, 4 F. & F. 13, and other cases, but am not

able to come to the conclusion that the pleading should not remain on the record.

The plaintiff may possibly obtain the relief he seeks when the whole evidence comes before the Court. As to this, I am not called upon to express an opinion.

The plaintiff's counsel said his main object was, to compel the defendant to plead justification, and not indirectly obtain the benefit of such a plea.

As the plaintiff's allegation is, that the statements are false and malicious, and as the defendant has not admitted that they are false, although denying that they are malicious, it may be that the record will, at the trial, be read as if the defendant expressly denied that they were false, *i. e.*, expressly pleaded they were true.

It is not necessary to formally so decide, and I therefore express no further opinion.

I must overrule the demurrer. Costs in the cause to the defendant.

[CHANCERY DIVISION.]

WEST V. PARKDALE ET AL.

AND

CARROLL V. PARKDALE ET AL.

Corporation—Acting as agents—Trespassers—Damages.

The judgment of Wilson, C. J., ante p. 270, affirmed on appeal to the Divisional Court, and the village of Parkdale held liable for damage done to the plaintiff's land by the construction of the subway for Railways under Queen street.

THIS case reported *ante* page 270, came on by way of appeal to the Divisional Court, from the judgment of Wilson, C. J., and was argued on December 19th and 20th, 1884, before Boyd, C., and Proudfoot, J.

McCarthy, Q.C., Osler, Q.C., and J. H. McDonald, for the corporation of the village of Parkdale who appealed.

The action is one for compensation for damages to real estate caused by the construction of a railway subway, by which the land in front of the plaintiff's property has been lowered. The authority for the work is an Order in Council under 42 Vic. ch. 9, secs. 48, 49, as amended by 46 Vic. ch. 24, sec. 4. This order was not made until all parties interested were heard. The power to do the work was granted to the railway companies, and under an agreement with the companies the corporation of Parkdale have done the work. The corporation have been found to be trespassers by the judgment of the learned Chief Justice, and damages have been granted against them with a reference to the Master to ascertain the amount. The companies agreed that the corporation should manage the work, and have all the powers that they had. If the plaintiffs are entitled to any compensation for their injury, they are not entitled to get it by way of damages from the village as wrongdoers. The companies, if they had done the work,

would not have been wrongdoers, and the corporation are in no worse position than they would have been. If any compensation should be paid to the plaintiffs it should be borne by the railway companies. The companies under the Order in Council had the right to do the work, and had all the powers under the Railway Act of 1879 (42 Vic. ch. 9 D.) see sec. 15 and sub-sections. The railway companies were crossing the street on the level and the railway committee had the right to say they must go over or under; and the order, when issued, settled it. The act done here is not an entry on the land of the plaintiffs, and even if the companies have to make compensation, it is not a condition precedent to the doing of the work. [PROUDFOOT, J.—Is there a right of compensation where there is no entry?] It may be that the plaintiffs have no right to compensation at all: *Lister v. Lobley*, 7 A. & E. 124; *Hutton v. The London and South Western R. W. Co.*, 7 Hare, 259; *Ferrand v. Bradford*, 21 Beav. 412; *Yeomans v. Wellington*, 4 A. R. 301; *Mayor, &c. of Montreal v. Drummond*, 1 App. Cas. 384. The companies had to do the work, and the corporation, if acting in any capacity, were acting as their contractors, and therefore cannot be held to be trespassers. The village as a corporation cannot be held liable in any event, if the act of doing the work is *ultra vires*, as is contended, but the individual members of the council might be. The agreement does not shew that the work is being done any more by the corporation than by the companies. It might be contended that the engineer Hobson was doing it, and the corporation were merely the custodian of the fund for payment. The effect of the judgment of the learned Chief Justice is, that the corporation of Parkdale are trespassers, and if that judgment is good, the hole must be filled up and the place restored to its original shape. [PROUDFOOT, J.:—Because it is a continuing trespass?] Yes, as the corporation of the village are liable to be proceeded against again. It is immaterial to the property owners who does the work, the only question they are interested in is, how is the work done?

They have nothing to do with the question whether the corporation of the village can do the work as agents.

See 46 Vict. c. 18, O., ss. 393 and 486; *Yeomans v. Wellington*, 4 A. R. 301; *Ricket v. Directors, &c., of Metropolitan R. W. Co.*, L. R. 2 H. L. 196; *Rex v. London Dock Co.*, 5 A. & E. 163; *Jones v. Stansted, &c., R. W. Co.*, L. R. 4 P. C. 98; *Beckett v. The Midland R. W. Co.*, L. R. 3 C. P. 82; *Caledonian R. W. Co. v. Walker's Trustees*, 7 App. Cas. 259.

The right of a corporation to close up a street is admitted if there is another entrance for the property owner, even when that other is less convenient: *Re McArthur and the Corporation of the Township of Southwold*, 3 A. R. 295. This Court has no power to interfere in this case; the plaintiff's remedy is by mandamus: *Vandecar v. The Corporation of East Oxford*, 3 A. R. 131. The valuation should be for land taken: 42 Vict. c. 9, amended by 46 Vict. c. 24, s. 4 D. There is no authority to sustain the judgment. The burden should be put upon the railway companies and the remedy would then be complete, and the companies should make the compensation. [BOYD, C.—They are not parties.] The cases must be different here from those decided under the English Acts, which latter are wider in their terms than ours.

S. H. Blake, Q. C., and Lash, Q. C., for the plaintiffs in the West suit, and

S. H. Blake, Q. C., and Snelling, for the plaintiffs in the Carroll suit.

Both the cases are argued together. The evidence taken in the Court below shows that the property in question has been depreciated in value from \$150 a foot to \$20 a foot, and it is admitted that there is a right to damage, if there is any cause of damage? (*J. H. Macdonald*, No. The whole question is, even assuming that there was damage done, this is not the proper forum, because there is no right of action.) The Chief Justice held that the question was, Is the corporation of Parkdale doing the work or not? and he decided that they were. The defendants'

amended statement of defence, alleges that the corporation of the village were agents for the railway companies, but did not ask for the companies to be brought before the Court, nor for indemnity from them. The defendants contend that they are not proceeding under the Special Act, or under the Railway Act, either of which would give compensation, but they seem to wish to make the property owners pay for a great part of the subway for the benefit of the city and village. They contend they were mere agents of the companies, but the evidence shows they supplied \$7,000 towards the cost, and were co-contractors and co-workers. The agreement shows the proportions in which the cost was to be borne, and how the corporation of Parkdale were acting for themselves in controlling the works and maintaining the streets afterwards. Another proposed Act of the Legislature was withdrawn because it was opposed, and it was opposed because it gave no compensation. The evidence of the witness Stokes shows he prepared the plans for and looked for his pay to the corporation of Parkdale. The plaintiffs ask for compensation either under the Special Act, 46 Vic. ch. 45 O., or as trespassers, not as for a continuing trespass, but once for all. There is no authority that in a case like this the members of the village corporation should be liable, and not the corporation as a body. The corporation cannot take the benefit of the subway as a corporation, and then repudiate the liability therefor. It is within the corporate powers of Parkdale to do the acts complained of in a certain way, and they have done them in a wrong way and should be liable. There is nothing in the agreement about the members of the corporation being liable, and not the corporation as a body. See 3 of 46 Vic. ch. 45 O. provides for their agreeing before the work is done for the expenses, *including compensation* [J. H. McDonald.—They cannot agree.] Then they cannot do the work. If an action was brought against the railway companies, they would say we are not doing the work, but only supplying part of the funds for payment. The documents do not show that the companies were acting under the Order in Council, and that the

corporation of Parkdale were their agents. The contract for the work is made directly between the corporation of Parkdale and the contractor. Corporations have been made liable for libels and other torts: *Bryce*, on *Ultra Vires*, 2nd Am. ed., ch. 9, p. 330; *Tench v. Great Western R. W. Co.*, 33 U. C. R. 8; *Holliday v. Ontario Farmers Mutual, &c. Co.*, 33 U. C. R. 558.

McWilliams appeared to watch the case on behalf of the city of Toronto, and mentioned that the question of costs up to and of the hearing was to be spoken to before Chief Justice Wilson.

McCarthy, Q. C., in reply. The line of argument of my learned friends is not supported by the pleadings or the evidence. There was no attempt by the corporation of the village or the railway companies to defraud the plaintiffs of their rights. Under the special Act 46 Vict. ch. 45, O., the city of Toronto and the village of Parkdale tried to come to an agreement and failed, and as the village was so much interested in the Queen street crossing, the railway companies went to the Dominion Parliament and got the Order in Council, and the village bonused them to do the work by paying part of the cost. If the Legislature does not provide that the parties whose lands are *injuriously affected* shall get compensation, that is the fault of Parliament, and this Court cannot remedy it. The railway companies certainly had power to do the work under the Order in Council, and if so, what is to prevent them doing it by an agent or servant? There was endless bargaining between the companies and the corporation of the village as to the terms on which the work was done, and the latter said, rather than have this trouble and waste of time, we will pay \$7000 towards the work and undertake the management of it. If the corporation of the village are trespassers, the Court cannot make them pay compensation. Corporations are liable for torts, but the tort must be within the scope of their authority: *Bryce* on *Ultra Vires*, 2nd Am. ed., ch. 9, p. 330. In this case the work

has not been done within the authority of the corporation as it was not done under the Act.

This action is premature in any event, and no arbitration could be proceeded with until the work is completed.

February 12, 1885. BOYD, C.—The one argument addressed to us on behalf of the municipality of Parkdale in order to induce the reversal of the judgment, may be thus summarized: The construction of the subway was authorized and justified by the Order in Council and the Railway Acts; it was contemplated by the Order in Council that the control of the works requisite therefor should be undertaken by the village; the agreement between the railway and the village provided for the village, at the request of the railways, taking the control of the works, with power to let contracts and compel the carrying out of the same; in pursuance of this arrangement, Parkdale as agent of or in subordination to the railways lowered the highway in front of the plaintiffs' properties, and occasioned the injuries now complained of; but the parties to make amends are the railways not the municipality; it may be that as no lands of the plaintiffs were actually taken no compensation is recoverable as against the railways: if so, for this reason none should be recovered against Parkdale; but if the plaintiffs are entitled to damages as for lands injuriously affected, the railways, who are the principals, should answer this demand, and not the village corporation, which has only done the work in the place and stead of the railways under the agreement between them. In short, it is said, the village cannot be treated as trespassers because the work is authorized: it could have been lawfully done by the railways, and what matters it to the plaintiffs by what agency it is done.

This line of argument is plausible, but I have not been able to satisfy myself that it is sufficient to exculpate the defendants who appeal. The matter is to be dealt with from the plaintiffs' point of view. The village authorities enter

into a contract for the construction of a subway, the effect of which is to sink the street several yards below the level of the plaintiffs' places of business, and to render them utterly inaccessible from the highway upon which they front. Ordinarily a municipality could not do this without making proper compensation. The special Ontario Statute providing for work being done by the conjoint action of the railways and the municipalities of Toronto and Parkdale provided for such compensation. Then having done the mischief to the plaintiffs, what justification has the village to offer to exempt it from the consequences? It cannot shelter itself under cover of the railways, for it is not a subordinate body to the railway corporations. *Respondeat superior* does not apply to such a case as this.

The village corporation has no capacity conferred upon it by municipal legislation to act as agents for other corporations.

These municipalities have large original powers directly conferred by the Legislature involving the construction of and the interference with streets and highways within their territorial limits; but there is no law enabling them to act in the execution of such works as the representatives of other limited corporations.

So, on the other hand, whatever rights may be exercised by the railways under orders in council and Railway Acts, they as corporations have no power to delegate any part of those rights and privileges to municipal bodies, nor have municipal bodies any capacity to receive or exercise any such delegated functions. The action of the Parkdale authorities in this case was not and could not be that of agents, or representatives of the railways, but as principals doing work which the municipality was not legally authorized to undertake. By taking proper preliminary steps the acts of the municipality would have been lawful, so that the matter cannot be treated as one to all intents *ultra vires*. As a corporation, Parkdale entered into the construction contract with the people by whom the work was actually done, and so have become liable as a corpora-

tion for the injurious consequences to the plaintiffs resulting from that work.

I can find no satisfactory reason for interfering with the judgment of the Chief Justice, and I think it should be affirmed, with costs.

PROUDFOOT, J.—The defendants contend that they are not doing the work under the special Act 46 Vict. c. 45 (O.) but under the Order in Council made pursuant to the 46 Vict. c. 24, s. 4, D., substituting new sections for sections 48 and 49 of the Consolidated Railway Act of 1879; and that the only remedy the plaintiffs have, if they have any, is for compensation under these substituted sections; and that it is exceedingly doubtful if they have any remedy at all, as here no land has been taken, and these sections give no right to compensation for lands that have been simply injuriously affected.

If this last were the only question I should have great difficulty in coming to the conclusion that the plaintiffs were liable to have their property rendered comparatively useless, and yet be without remedy. It is true that the substituted section 48 says that all the provisions of law applicable to the taking of land by railway companies, and its valuation and conveyance to them, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the railway committee. But the sections of the Railway Act of 1879, under the heading of "Lands and their valuation," include lands which may suffer damage from the exercise of any of the powers granted to the railway. All Acts of this kind granting exceptional powers to railway companies are to be construed strictly as to the railway companies, but liberally and favourably as to the persons affected by them, and who may suffer injury from the exercise of the statutory powers in derogation of common right. It requires no great astuteness to read the phrase, "land required for the proper carrying out of the requirements of the railway committee" as referring to

and including lands that may suffer damage from the exercise of the powers granted to the railway. And *Yeomans v. Wellington*, 4 A. R. 301, shews that the injury to the plaintiffs' lands in this case is of such a nature as to entitle them to compensation under the Railway Act.

But it is not necessary to decide that question at present; for the order in council imposes no duty and confers no right upon the defendants in regard to the construction of this subway. It is strictly confined to the railway companies, and authorizes *them* to carry Queen street under their railways and to execute all the works requisite therefore.

I agree with the learned Chief Justice in his conclusion that the defendants are not working under the Special Act, 46 Vic. ch. 45 O.

If the defendants are acting under the order in council it must be as agents of the railway companies. It is not contended that the defendants are not doing the work, but it is said they are doing it for the railway companies.

The terms of the agreement between the defendants and these companies inclines me to think that they were all acting as principals. The defendants furnish a portion of the funds, one-fifth. That could not be as agent of the railway companies.

The defendants were not acting under their municipal powers for these did not extend to work beyond their own boundaries, as are the works in this case, and the proper steps had not been taken as required by the Municipal Act.

As the Order in Council conferred no authority on the defendants to execute these works, and as they are not acting under the special Act, nor under their municipal powers, the only question remaining is, assuming them not to be principals, whether they could act as agents for the only persons authorized to do the work under the Order in Council.

I have considered the Act calling the defendants into existence, the Municipal Act, and the powers conferred on them by it, and I have failed to find in any of the numer-

ous powers conferred on them an authority to act as agents for others. They have large powers with regard to the streets within their own limits,—they have a legislative authority within certain bounds,—but the very idea of such authority is inconsistent with the supposition that they are not to exercise their own judgment but to carry out the will of another, and as agents they must be subject to that will. They may employ agents, engineers, overseers, workmen, but I cannot find that they can act in that capacity. If that be so, within the area of the municipality, it is so *a fortiori* when the work to be done is beyond its boundaries. The special clauses that it was found necessary to introduce as to the jurisdiction over roads and bridges on the boundary line between two municipalities is evidence of this : 46 Vic. c. 18, ss. 538, 539, 550, O. They exist for a specific purpose ; outside of that they have no legal existence. Whatever they do is without legal authority, and they are liable as trespassers.

It was said that a corporation may indeed be liable for a tort ; but it must be for something within the scope of their authority, and that it has not been decided that they are liable for torts committed *ultra vires*.

They have been held liable for an assault and battery and for false imprisonment committed by their servants in the exercise of their orders : *The Eastern Counties R. W. Co. v. Brown*, 6 Ex. 314; and for a malicious prosecution : *Whitfield v. South Eastern R. W. Co.*, Ell. Bl. & Ell. 121; *Edwards v. Midland R. W. Co.* 6 Q. B. D. 287—acts which can scarcely be considered within the scope of any authority for which they were incorporated. But assuming it to be necessary to shew the act to be within the scope of their authority, it is shewn here, for by taking the proper steps under the special Act they might have executed the work in question. Not having done so, they are trespassers, but within the scope of their authority, and therefore liable.

I think the judgment is correct throughout, and should be affirmed.

G. A. B.

[CHANCERY DIVISION.]

KEEFER V. ROAF ET AL.

Tax sale—Agreement—Joint purchase—Illegality—Statute of Frauds—Signature by initials—Sufficiency of memorandum—Pleading.

At a tax sale of lands, J. R. R. and T. A. K., finding there would be a contest between themselves for lots 1118 and 1119, signed an agreement, with their initials in the margin at the bottom of the page of the Gazette, containing the list of lands to be sold, as follows :

Mr. J. R. R. { We buy on joint acc't of 1118, { J. R. R.
Mr. T. A. K. { 1119, sheriff's Nos. above. { T. A. K.

The sheriff's numbers had not been printed in the Gazette, but T. A. K. had prefixed them in ink to most of the parcels on that page of the Gazette, including Nos. 1118 and 1119. It was not stated anywhere in that list that these numbers were sheriff's numbers. J. R. R. having bid for the lots, and afterwards caused them to be conveyed to B., T. A. K. now brought this action against J. R. R. and B., claiming specific performance of the above agreement, and a declaration that J. R. R. and B. were trustees for him of an undivided moiety of the lands.

Held, affirming the decision of Proudfoot, J., that the above constituted a sufficient memorandum of the agreement within the Statute of Frauds. The manner of paying the amount of taxes, or by whom payment was to be made, was not one of the essentials of the contract as between the parties. The implication of law would be that whoever paid so as to complete the sale should have contribution of a moiety from the other. *Held*, further, that the defendant appealing not having pleaded the defence of the statute, could not claim the benefit of it.

Held, also, that the above agreement was not illegal, nor did it make any difference that it was a tax sale.

THIS was an action brought by Thomas A. Keefer against James R. Roaf and Lucy D. Beck, claiming specific performance of a certain agreement to purchase certain lands, situate in the district of Thunder Bay, at a sheriff's sale for taxes, and a declaration that the defendants were trustees for the plaintiff of an undivided moiety of the lands so agreed to be purchased ; an injunction to restrain the defendants parting with the lands ; a partition or sale thereof ; all necessary accounts and enquiries, and further relief.

The sale in question took place on October 12th, 1881, and Messrs. Roaf & Roaf, a firm of solicitors, of which the defendant Roaf was a partner, were instructed to buy lots 1091, 1093, 1118, and 1119, by Mr. Frederick Beck, the treasurer of the North Shore Mining Company.

It appeared from the evidence that, finding that there was to be a contest for lots 1118 and 1119, the plaintiff intending to bid on them, an agreement was signed with the initials of the plaintiff and defendant Roaf in the margin of the Gazette containing the list of lands to be sold, at the bottom of the page containing the lots in question, in the following terms :

"Mr. J. R. Roaf. { } We buy on joint acc't of 1118, { J. R. R.
" T. A. Keefer. { } 1119, sheriff's Nos. above. { T. A. K."

The sheriff's numbers had not been printed in the Gazette, but the plaintiff had prefixed them in ink to most of the parcels on that page of the gazette, including the numbers 1118 and 1119. It was not stated anywhere in that list that these numbers were sheriff's numbers.

The action was tried at Toronto on April 25th and 30th, and May 1st, 1884, before Proudfoot, J.

The defences relied upon by the defendants were, that the agreement was illegal : that there was no sufficient writing to satisfy the Statute of Frauds ; and that the agreement between the parties was that each stated they were bidding for the owners of the lots, and that the purchase by the defendant Roaf was to be held for the owners whether represented by the plaintiff or the defendant Roaf, and that the plaintiff did not represent any owners, while the defendant Roaf did, and that his principals were alone entitled to the lots, and that he had procured it to be conveyed, pursuant to their directions, to his co-defendant.

On May 12th, 1884, the learned Judge gave judgment, holding the plaintiff entitled to specific performance of the agreement in the statement of claim mentioned, and to a declaration that as to a moiety of the land the defendant Lucy Beck was a trustee for him, and that she should execute a conveyance accordingly, and ordered a partition of the property, and that the plaintiff should have his costs.

On the question of illegality, and as to the agreement being sufficient within the Statute of Frauds, his judgment was as follows :

"As to the first objection of illegality, I do not think it sustainable. Lord St. Leonards in the 14th ed. of his Law of Vendors and Purchasers, notices it at several places. At p. 118, n. I., he says, that an agreement by the parties not to bid against each other is not illegal and could not be complained of, unless from the circumstances connected with it it amounted to a fraud upon the Court; citing *In re Carew's Estate*, 26 Beav. 197, where a contrary opinion in a former edition of the same book was dissented from. And at p. 700 he repeats that such an agreement is not illegal, citing the same case and *Gulton v. Emus*, 1 Col. 243. I do not think it makes any difference whether the sale were by private auction, or under an order of the Court, or at a tax sale. If it were an objection in one it ought to be in all. The cases referred to of *Henry v. Burness*, 8 Gr. 345; *Massingberd v. Montague*, 9 Gr. 92, and *Logie v. Young*, 10 Gr. 217, were of an entirely different character. There was a general combination of most of the bidders to prevent a fair sale. It was shewn in *Henry v. Burnese*, that by an arrangement between several of the parties attending and bidding at the sale, it was agreed that each should be allowed to bid off a whole lot for the amount of taxes due upon it; and others, not parties to the agreement, were prevented from bidding, by reducing the quantity to such a trifle as to be quite useless to the purchaser; and the other cases were similar. A sale under such circumstances would not be supported under the English cases referred to, as it would be a fraud. No such combination is shewn to have existed here. Many hundreds of lots were sold during the three days that the sale lasted, and there was no evidence of any agreement not to bid against each other except this, and one other in respect to lots 1115, 1118, 1117, and 1120.

Nor do I think the objection as to the Statute of Frauds should prevail. It was said that the agreement required parol evidence to shew that the numbers placed in the margin were sheriff's numbers, it not being so stated in the Gazette. The numbers 1118 and 1119 only appear once on the page of the Gazette on which the agreement was written, and both parties by the agreement refer to them as sheriff's numbers, and parol evidence is not required to identify them. The numbers are placed opposite the lands which are the subject of the agreement, and plainly the parcels of land as indicated by the numbers are the subject of the contract.

Independently of this solution, I am inclined to think that the reference to "sheriff's numbers above" would justify the admission of parol evidence to ascertain what the sheriff's numbers were. It was a sale by auction by the sheriff, the long list of lands to be sold were advertised by the sheriff, the bidding book, in which the sheriff or his agent entered the sales and which was signed by the purchasers, numbered the various parcels of land, and the defendant J. R. Roaf signed as purchaser of these lots in that book, and it did not appear that there was any other book or any other numbers to which the agreement could refer; see *Baumann v. James*, L. R. 3 Ch. 508; *Nene Valley Drainage Commissioners v. Dunkley*, L. R. 4 Ch. D. 1; *Fry on Spec. Perf.*, 2nd ed. p. 239."

On September 8th, 1884, the defendant Lucy D. Beck moved before Boyd, C., and Ferguson, J., by way of appeal from the above judgment.

C. Moss, Q. C., and *Cuttanach*, for the defendant Lucy D. Beck. The memorandum is not sufficient within the Statute of Frauds; it refers to the sheriff's numbers, and this necessitates parol evidence to connect the sheriff's numbers with the memorandum: *Commins v. Scott*, 20 Eq. 11; *McUlung v. McCracken*, 3 O. R. 596. It contains no statement how the money is to be paid or payment made: *Alderson v. Muddison*, 8 App. Cas. 467. It does not say who is to advance the price, and when and how: who is to pay, or if jointly in what proportions: *Seton on Decrees*, pp. 1089, 1288-1294.

S. H. Blake, Q. C., and *Snelling*, for the plaintiff.

September 9th, 1884. BOYD C.—The signature by the initials of the agent is a sufficient signature to bind the principal: *Higgins v. Senior*, 8 M. & W. 834; *Heard v. Pilley*, 4 Ch. 548; *Beer v. London and Paris Hotel Co.* 20 Eq. 412-426; *The Salmon Falls Manufacturing Co. v. Goddard*, 14 How. S. C. U. S. 446; *Fry on Spec. Perf.* 2nd ed., ss. 500, 503. Parol evidence is admissible to ascertain or identify the particular lots mentioned by

numbers, in so far as to shew that the numbers are those in the sheriff's book : *Ridgway v. Wharton*, 6 H. L. Cas. at p. 258, *seq.*; *Baumann v. James*, 3 Ch. 508; *McMurray v. Spicer*, 5 Eq. 527. The manner of paying the amount of taxes, or by whom payment was to be made, is not one of the essentials of the contract as between the parties. The implication of law would be that whoever paid so as to complete the sale should have contribution of a moiety from the other. That is one of the details (immaterial, so far as the Statute of Frauds is concerned) which would be supplied as a conclusion and by operation of law, and which in this instance accords with the arrangement or understanding of the parties that each should contribute one half. See *Potter v. Duffield*, 18 Eq. 4; *Lightbound v. Warnock*, 4 O. R. at p. 196; *Reid v. Smith*, 2 O. R. at p. 74; *Cayley v. Walpole*, 18 W. R. 782; *Hoadly v. McLaine*, 10 Bing. 482. But another answer to this line of argument, claiming the benefit of the Statute of Frauds, is, that the defendant who appeals has not set up a defence of the statute, nor indeed has she pleaded any of the special matters which were urged before us as grounds for reversing the judgment against her.

These points of law on which I have given my conclusions, with the authorities on which they are based, are the only points of law admitting of serious argument which I discover in the case under review. The language of the agreement signed by the parties is, on its face, sufficiently explicit to justify the conclusion that they were dividing the lands in equal moieties, irrespective of what the actual ownership of the lands might be. There is no sufficient reason alleged for disturbing on the evidence the findings that Mr. Roaf was not acting for the owners (*i.e.* the mining company), and that his bargain with the plaintiff to prevent competition was not conditioned on the plaintiff being able to shew that he was acting for owners or part owners of the land.

The cases in which the Court has declined to interfere on account of some misunderstanding of the terms of

the contract by one of the parties do not apply here. There are no equivocal terms in this writing which might be capable of two meanings as to which the agent of the defendant could have been misled. His contention involves the addition of a term to the contract, which, upon the conflicting evidence and the finding of the Court of first instance, would be inadmissible. But the contract as signed contains all essential terms, and is only capable of one construction, and upon the terms of that contract the parties must stand or fall, even in an action for specific performance.

The result is, that the judgment should be affirmed, with costs.

FERGUSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

CARNEGIE V. FEDERAL BANK OF CANADA.

Pleadings—Admissions—Master's office—Departure from record—Pledge of stock—Ear-mark—Identification of pledged stock.

In his pleadings, in an action for an account the plaintiff set up that on April 23rd, 1878, he transferred to the defendant 160 shares of a certain bank, as a security for a loan, and that pending the loan the defendants had sold the said stock and realized more than the indebtedness, whereof he claimed an account, and the parties went to trial on admissions that the bank stock was in the defendants' hands at the said date. In the Master's Office the plaintiff sought to raise an issue as to whether the defendants actually did hold the bank stock on that date, or whether, having held it previously as security for another loan, they had not parted with it before the said date, and falsely represented to the plaintiff that they still held it, and whether they were not liable to be charged with its market value as of that date.

Held, affirming the decision of the Master in Ordinary, that the plaintiff could not be allowed thus to set up a different state of facts and cause of action from that spread upon the record.

Sembler, that inasmuch as it appeared that the defendants held at the date of the loan 160 shares of the bank in question : and inasmuch as the particular shares were not identified or ear-marked in any way, it could not be considered proved that the defendants had not 160 shares applicable to the plaintiff's loan on the date in question.

THIS was an appeal from the report of the Master-in-Ordinary made in pursuance of the order of reference in this case, which is reported in 5 O. R. 418.

The ground of this appeal was, that the evidence shewed that on April 23rd, 1878, the defendants had converted to their own use 160 shares of Ontario Bank stock pledged with them in security for one of the loans in question in this action, and that the Master should have so found, and should have given credit to the plaintiff for the value of the said 160 shares at the current market value on April 23rd, 1878.

The pleadings had been framed and the case tried on the assumption that the securities in question, the said 160 shares of Ontario Bank stock, had been pledged on April 23rd, 1878, when the loan was made ; but it was discovered in the Master's office, and then for the first time brought to the recollection of both parties, that these shares had

been pledged by the plaintiff with the bank some months previously on another loan; and that they had been carried forward to the loan of April 23rd.

On this state of facts an issue was raised in the Master's office as to whether the bank actually did hold these shares on that day, the plaintiff contending that having subsequently assigned shares redeemed by other borrowers it had no shares applicable to the plaintiff's loan, and was therefore liable to be charged with their market value as of that day.

It appeared in the Master's office that all Ontario Bank shares received by the bank as collateral securities were placed to the credit of "H. S. Strathy, cashier, in trust," in the books of the Ontario Bank, and that on or before April 23rd, 1878, and as far back as the account was investigated, there were always at least 160 shares standing to the credit of this account; and Mr. Strathy, on examination, stated that the bank had always been ready to return the plaintiff's securities on demand. He also stated that at this distance of time, and in consequence of the destruction of a memorandum book, it was impossible for him to identify the devolution of the plaintiff's shares, or to distinguish them from those of others.

The plaintiff attempted to put the bank in default by shewing that if it had been called upon on April 23rd, 1878, to restore the plaintiff's shares and those belonging to other parties which presumably it should have had in its hands on that day, it could not do so out of the account in the Ontario Bank. But no evidence was given as to whether the bank had acted properly or improperly with regard to the shares of such third parties; the plaintiff's contention being, that when the bank transferred any stock received from them it must be presumed the transfer was made in conformity with the trust on which the bank had received this stock, and that if there was any shortage it must be presumed to have been on the plaintiff's stock which the bank denied having transferred.

The Master delivered the following written judgment:

March 17th, 1884. THE MASTER-IN-ORDINARY.—It was in evidence at the hearing that the defendants, on April 23rd, 1878, held certain Ontario Bank shares for various borrowers, all of which shares by June 1878, they re-transferred to such borrowers, who between those dates paid off their loans, leaving the defendants without any shares applicable to the loan made to the plaintiff. On this state of facts the plaintiff asks me to find that on April 23rd, 1878, the defendants held none of the shares which had been assigned to them as security for the loan made to the plaintiff. And as aiding him in this contention, the plaintiff has given proof before me that these shares were in fact assigned to the defendants on November 1st, 1877, when as is now stated the original loan on the Ontario Bank shares was made to the plaintiff.

The pleadings, and the contract proved at the hearing, negative the plaintiff's right to be thus aided in his contention before me. The one alleges and the other proves that the loan was made on April 23rd, 1878, and the decree is based upon the *allegata et probata*. To give effect to what he now asks would require an amendment of his pleading, and also leave to give evidence of a different contract than that upon which the Court adjudicated when it directed the reference here. Or, to put the matter in plain terms, it would allow the plaintiff to show that the shares which in his pleading he states were transferred to the defendants as security for a loan made on April 23d, 1878, were not in his possession or control on that day, but had been transferred to the defendants on November 1st, 1877, and that the loan which in his pleading he states was made to him on the security of the said shares on April 23rd, 1878, was not in fact made on that day but on November 1st, 1877.

I have no such jurisdiction. Parties who come before the subordinate tribunal of the Master's office, must learn it has only a delegated and a very limited jurisdiction, and that it possesses no part of the original jurisdiction of the Court either as to amendment of pleadings, or variation of a decree.

But if such a case were open to the plaintiff, he has given no evidence of the defendants' dealings with Ontario Bank shares between November 1st, 1877, and April 23rd, 1878; and there is nothing before me to show when the loans redeemed after April 23rd, 1878, were made, or

whether the Ontario Bank shares held by the defendants on April 23rd, 1878, were covered by such other loans.

The shares which the plaintiff assigned to these defendants were not ear-marked, and could not be traced or distinguished from other shares assigned to the bank by other borrowers as security for similar loans.

Then as all such Ontario Bank shares had become incapable of identification, it appears to me that the plaintiff's contention is based on the supposition that the contract rights of the other borrowers were the same as those of the plaintiff. In the absence of such borrowers these could not be investigated, nor priority of transfer, nor other equities arising out of such contract rights.

The plaintiff asks me to hold as a presumption of fact that, by reason of the re-transfers of Ontario Bank shares after April 23rd, 1878, to other borrowers who redeemed their loans after that date,—which on June 25th, 1878, left no shares available for redemption by the plaintiff, there were no shares held by the defendants for the plaintiff's loan on the 23rd day of April. Apart from this, which, as I have already shewn, would be practically a repudiation of his pleading, there are other presumptions of fact just as forcible, viz., that the defendants had, with the consent of the prior borrowers, sold or trafficked in the shares such borrowers had assigned to them, and that the quantity of shares held by the defendants on April 23rd, 1878, left intact the shares assigned by the plaintiff.

Such presumptions of fact are mere arguments derived wholly from the point of view the circumstances of the case are looked at; and being equally forcible may be held to negative each other. And in the absence of evidence of the actual dealings of the bank with these shares, assuming such evidence to be admissible, I must decline to give effect to any of them.

But apart from this I note that the Chancellor in his judgment gives what appears to be the result of the evidence before him. Not being incorporated in the decree his conclusion may not technically be findings on the questions of fact; but I doubt if I am at liberty to disregard them. If I am at liberty, I find them consistent with the evidence before me, except in so far as they may be varied by the evidence I have declined to give effect to, and I therefore adopt them, and rule that the account must be taken in accordance with the Chancellor's statement of the evidence or "findings."

The plaintiff now appealed from this decision of the Master on the ground above stated.

The appeal was heard on March 27th, 1884, before Boyd, C.

J. R. Roaf, for the appeal. Under the authority of *Langton v. Waite*, L. R. 6 Eq. 165, 4 Ch. 402, cited at the hearing, we are entitled to the identical stock if it can be identified. We are entitled either to the stock or the market value of it at the time of conversion. The Master should have found that on April 23rd, 1878, the defendants did not have the stock. [BOYD, C.—You had not identified the stock when you gave it to Mr. Strathy. Why then was it his duty to ear-mark it, when you had not done so?] But it was earmarked when we gave it to him. We gave him certain stock; it was his duty then to hold it for us; if he puts it into one common pen, so to speak, he is responsible for it. We simply ask to take Mr. Strathy's own evidence before the Master. He shews on that day, April 23rd, 1878, he was short 160 shares, and we ask to be credited with the value of them. *Lewis* on Stocks, p. 43, shews there must be something to represent the title to the stock. *Cavanagh* on Money Securities, p. 155, lays it down in the same way. We should not suffer for the way the accounts were kept, a matter over which we had no control.

A. J. Cattanach, contra. I refer to *Jones* on the Laws of Pledges, secs. 508-10, and to *Allen v. Dybers*, 3 Hill (N.Y.) 593, 7 ib. 497, referred to in the judgment at the trial. See also *McDonald v. Lane*, 7 S. C. R. 462; *Nourse v. Prim*, 4 Johns. Ch. 490; *LeCroy v. Easton*, 10 Mod. 499; *Cud v. Ruther*, 1 P. Wms. 569; *Lewis* on Stocks, p. 125. But the other side say *Langton v. Wait*, 6 Eq. 165, 4 Ch. 402, referred to in the judgment at the trial, shews the plaintiff is entitled to the return of the identical stock. That case however is distinguishable. The true question here is, whether we had sufficient shares on hand to answer the demand of the plaintiff if he should call upon us. There is no dispute as to the facts, which are as follows: On April

23rd, 1878, there was a consolidation of two loans (there having been previous transactions) resulting in \$48,000 being credited to Carnegie, who drew out that amount. On that day there was a new start. The plaintiff is in a dilemma. On April 23rd, 1878, we either had the 160 shares or not. If we had, there is no evidence of conversion after. If we had not, then there arises the question whether the plaintiff can go back. If he can, we can shew we always had the 160 shares both before and on April 23rd, 1878.

Roof, in reply. In the cases cited the parties always had in hand the stock sufficient to satisfy the demand which might be made upon them. [BOYD, C.—What the bank says is, we had 160 shares in our hands on April 23rd, 1878, which we could have transferred to the plaintiff on that day.] Yes; but they also say they had the other loans on hand. We don't want to go into the rights or accounts or dealings with other parties. We simply take Mr. Strathy's statement that he did not on that day have our stock, and he must give us the value of it. If the Master's holding is correct, it overthrows all the benefit that would result from your Lordship's judgment.

April 2nd, 1884. BOYD, C.—It does not appear to me that the present contention of the plaintiff is open to him on the pleadings and proceedings in this action. What he now claims is, on the footing of a different cause of action altogether. By the statement of claim the plaintiff sets forth that during the months of April and May, 1878, the bank lent money to the plaintiff, who gave the bank as security assignments of Ontario Bank stock and of Bank of Commerce stock (par. 1). Soon after the making of the loan it is alleged that the defendants sold the Bank of Commerce stock and credited the proceeds (par. 2). It then charges that the defendants did not hold the Ontario Bank shares during the currency of the loan, but that soon after the making of the loan the defendants disposed of that stock without notice to the plaintiff, and that by such

sales the defendants received more than enough to pay off the balance due by the plaintiff (pars. 8 & 9). Upon this pleading the parties went to trial upon admissions shewing that the Ontario Bank stock in question was in the hands of the defendants at the date of the loan (*i. e.*, April 23rd, 1878.) The agreement is, that "the Exhibit A shews how the officer of the bank held and dealt with the stock of the Ontario Bank transferred to him, including the stock in question." That admission, which is evidence for all purposes in the action, (including the proceedings in the Master's office) cannot be inferentially or argumentatively countervailed by detached parts of contradictory evidence going to shew that the defendants had previously disposed of 160 shares of the Ontario Bank stock, and were in default at the date of the loan. The plaintiff's argument now places the parties in this position : the plaintiff was induced to accept a loan from the bank on the representation that the bank had stock security for that loan in their hands, whereas in fact that security had been already sold, and the bank was indebted to the plaintiff for the proceeds of that stock, and should account on that footing. That is a very different state of facts from what is spread upon the record, and discloses a different cause of action.

But apart from this difficulty, and upon the merits of the appeal, Mr. Strathy's evidence in the Master's office as to the dealing with the stock, on p. 27, is to be read with his statement under oath in Exhibits annexed to the affidavits on bringing in the accounts. He there states that the general share account was kept by the bank for all transfers of stock held by the defendants as collateral security, and that there was no distinction between the shares held by the plaintiff and those held by other parties. Unless the evidence went far enough to establish that the shares referred to on that p. 27, *i. e.* 83 shares and 50 shares, and 95 shares and 61 shares, and 39 shares, were earmarked so as to be identified as the particular securities of the parties with whom the bank was dealing, it appears to me that the plaintiff has not proved that the bank had not

160 shares applicable to his loan on April 23rd, 1878. There is no such identification of these transferred shares as necessarily to lead to the conclusion that only the *residuum* after deducting these can be treated as the shares of the plaintiff.

I am unable to reverse the Master's report upon any grounds that have been argued before me, and it will be affirmed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

NELSON V. WIGLE ET AL.

Registered owner of vessel—Action for goods supplied—Evidence—Principal and agent.

Where one brought action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between whom and the defendants no relation of agency was proved.

Held that the plaintiff could not recover.

Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessaries did not make the registered owner liable.

THIS was an action brought by James Nelson against Simon Wigle and W. R. Callaway, claiming a sum of \$514.70 as due from them, and interest thereon from May 30th, 1882, in respect of certain spikes, nails, paint, oil, rope, and other articles, alleged to have been supplied by him between June 3rd, 1881, and June 1st, 1882, for the use of the steam barge *C. Y. Pratt*, of the Port of Windsor, of which steam barge they were the registered owners, (the former of 42 shares, the latter of 22 shares), at the time the several goods and materials were supplied. He alleged in his statement of claim that the articles so furnished were used in the construction and fitting out of the barge:

that on May 31st, 1882, \$514.70 was due to him for the said articles: that Wigle admitted the plaintiff's account to be correct, and only refused to satisfy it because Callaway would not pay his proportion: and that Wigle was the managing owner of the barge, and had always had the possession and control thereof.

In their joint statement of defence the defendants alleged that they were registered owners of the steam barge by agreement with Charles Nelson Pratt, who thereby secured to them payment of certain promissory notes endorsed by them and money advanced by them for the accommodation of the said Pratt, who was then building the barge in question, and required funds wherewith to finish it: that in accordance with the said agreement the vessel was on December 29th, 1881, registered in the name of Wigle, who thereupon transferred 22 shares to Callaway: that at first, pursuant to agreement, Pratt sailed and managed the said vessel as owner, and had entire control of her for the purpose of repaying them the debt due them: that it was not till November 1st, 1882, that either of them had possession or control of the vessel in any way: that while Pratt had possession of the vessel as aforesaid he purchased the goods mentioned in the statement of claim without their, the defendants', knowledge and consent: that Wigle finding Pratt was not sailing the vessel to advantage, and did not pay off the indebtedness to him and Callaway, about November 1st, 1882, took possession of her for the purpose of repaying himself and Callaway the money lent and advanced by them to Pratt: that they had tried to sell the vessel in order to repay themselves, but had failed: that none of the goods in question were purchased from the plaintiff by either of them, the defendants, or by any person for them, nor had they any dealings with the plaintiff: and they submitted that although they were the registered owners as aforesaid of the said vessel, they were only equitable mortgagees of same, and not liable for any of the debts incurred by Pratt prior to November 1st, 1882.

The rest of the facts sufficiently appear in the judgment. The action was tried at Sandwich on May 23rd, 1884, before Boyd, C.

McHugh, for the plaintiff. The defendants say that they were only mortgagees, but they wished to have all the advantages of registered owners. They were more than mortgagees. Moreover they got the benefit of the goods in question, which were necessaries for the vessel.

White and *Ellis*, for the defendants. The defendants were mortgagees only. The ship was registered under the Merchants' Shipping Acts of 1854, and 1862, Imp., 17-18 Vic. ch. 104, and 25-26 Vic. ch. 63. The defendants were not in possession until after the account with the plaintiff was closed. We refer to *The Innisfallen*, L. R. 1 A. & E. 72; *Morgan's Assignees v. Shinn*, 15 Wall. 105; *The Scio*, L. R. 1 A. & E. 353; *Keith v. Burrows*, 1 C. P. D. 722, 2 App. Cas. 636; *Dickson Reuter's Telegraph Co.*, 2 C. P. D. 60; *Gunn v. Roberts*, L. R. 9 C. P. 331; *The Troubadour*, L. R. 1 A. & E. 302; *Fraser v. Marsh*, 13 East 238; *Fraser v. Hopkins*, 2 Taunt. 5; *Mitcheson v. Oliver*, 25 L. J. N. S. Q. B. 39; *James v. Balfour*. 7 A. R. 461.

June 19th, 1884. BOYD, C.—The defendants appear as registered owners of the barge, to which the plaintiff furnished stores and supplies, on the 29th of December, 1881, for the first time. They were really but mortgagees for advances made to complete the construction of the vessel, and were not in possession of her till after the closing of this account for which the plaintiff now seeks to make them liable. The little evidence that was given repelled the inference that credit was ever given to the defendants, and indicated rather that the person with whom the plaintiff contracted was George Campbell. The plaintiff's case was mainly rested on the proposition that the vessel got the benefit of these supplies and necessaries, and that the defendants, as registered owners, are legally liable therefor. I find no

law justifying such a conclusion, but abundance of contrary authorities. It is open for the defendants to shew their real interest as mortgagees, though ostensibly registered owners: *Cox v. Reid*, R. & Moo. 199. In *Maude & Pollock's Mercantile Shipping*, 4th ed., p. 87, it is said: "Strictly speaking no liability arises from the mere fact of ownership. * * The inquiry always is, who made the contract, Upon whose credit was the work done?" My conclusion from the authorities is, that the plaintiff must fail, because the defendants were not the real contractors, nor was any agency proved in their ordering the supplies which would make these defendants liable as the principals concerned.

I dismiss the action, with costs.

A. B. F. L.

[CHANCERY DIVISION.]

BUCKLEY V. BEIGLE.

Forfeiture—Breach of covenant for payment of taxes—Landlord and tenant—Judicature Act.

In actions to re-enter for breach of a covenant in a lease, the Court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect, in all cases where, under the former practice, the Court of Chancery would have relieved against the forfeiture.

Thus in the present case, where the plaintiff claimed to recover possession of certain lands leased by her to the defendant on the ground of breach of the covenant for the payment of taxes, which breach the defendant afterwards remedied before statement of claim filed. *Held*, that the action could not succeed.

The above is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a mere money payment.

THIS was an action brought by Margaret Buckley against James Beigle, claiming to recover possession of certain lands leased by her to the defendant, and damages on the ground of breach of the covenants in the lease, and of injury to her reversion caused by the matters complained

of, and also an occupation rent. The lease was one made pursuant to the Act respecting short forms of leases, and, amongst others, the defendant was alleged to have broken the statutory covenants to pay taxes, and to repair and keep up fences. The lease contained a provision for re-entry for non-performance of covenants. The plaintiff claimed the right now to determine the lease and re-enter upon the premises.

The remaining facts of the case sufficiently appear from the judgment.

The action was tried at Chatham on May 29th, 1884, before Boyd, C.

Atkinson, Q.C., and Christie, for the plaintiff, referred to 44 Vic. ch. 25 O.; *Devanney v. Dorr*, 4 O. R. 206; *Taylor v. Jermyn*, 25 U. C. R. 86; *Chamberlain v. Turner*, 31 C. P. 460; *Ainley v. Balsden*, 14 U. C. R. 535; *Leighton v. Medley*, 1 O. R. 207; *Campbell v. Shields*, 44 U. C. R. 449; *Doe d. Matthewson v. Wrightman*, 4 Esp. 5; *Toronto Hospital Trustees v. Denham*, 31 C. P. 203.

Douglas, for the defendant, referred to *Addison on Contracts*, 8th ed. 258-9; *Doe d. Darlington v. Bond*, 5 B. & C. 555; *Roe v. Southard*, 10 C. P. 488; *Cole v. Buckle*, 18 C. P. 286.

June 19th, 1884. BOYD, C.—I disposed, at the close of the case, of most of the matters relied upon as shewing a right to enter for breach of covenants in the lease. One or two matters I said I would further investigate before giving judgment. This I have now done, and it affords me satisfaction to be able to dismiss the action, which, as I said at Chatham, appears to me to be of a most harsh and unreasonable character.

In actions to re-enter such as this, the Court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect, in all cases where under the former practice the Court of Chancery would have relieved against the forfeiture. Such would be the case

in reference to the non-payment of taxes. This omission was remedied in the present case before the statement of claim was filed. I am not satisfied that there was such a breach of this covenant as would work a forfeiture; but if there was, then that is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a mere money payment: *Elliott v. Turner*, 13 Sim. at p. 484; and *Hill v. Barclay*, 18 Ves. 163. Neither is there any clearly proved breach of the covenant to repair fences. The fences were made good from time to time. No complaint was ever made by the landlady, who went on the place and saw their condition. The moving of a fence from one place to another was, I judge, in furtherance of good husbandry, and altogether occasioned by the extension of the clearing. There was no complaint upon any of these matters, though they must have been all noticed by her. Nor was there any objection made or protest uttered against the state of affairs which now forms the staple of this action when the last rent was paid in August, before litigation began.

Upon the facts I found against all the other alleged breaches, and it but remains to dismiss the action, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

WRIGHT V. LEYS ET AL.

Assignment of mortgage—Purchase in trust for mortgagor—Statute of Frauds—Notice.

The plaintiff, who was mortgagee of certain lands, alleged that L., the present holder of the mortgage, purchased it from C. with knowledge of the fact that C. had purchased it from the original mortgagee as trustee for the plaintiff, who was to be allowed to redeem on paying whatever C. should pay for the mortgage, and a certain additional sum for C.'s services ; and sought to redeem on payment of what was due under the said agreement with C.

Held, that the above agreement fell within the Statute of Frauds, and should be evidenced in writing.

Held, also, that even if this were not so, L. could not be effected by such agreement, having purchased without notice of it.

THIS was an action brought by one A. F. Wright against J. Leys, F. J. Chadwick, W. F. Munro, R. S. Appelbe, and H. E. Caston, for the redemption of certain mortgaged premises in accordance with a certain alleged agreement between himself and an assignee of the mortgage.

The plaintiff alleged in his bill of complaint that on November 28th, 1874, he was the owner in fee simple of certain lands, which on that day he mortgaged to H. E. Parsons and W. Parsons, to secure \$2,250 and interest : that after various *mesne* assignments the defendant Munro became the holder of the said mortgage, who sold it by public auction to the defendant Chadwick for \$1,050, who purchased the same in pursuance of a certain agreement entered into by him with the plaintiff, that he should buy the mortgage at public sale as trustee for the benefit of the plaintiff, and that the plaintiff should be entitled to have the said mortgage discharged on payment of whatever amount he, Chadwick, should pay therefor, and upon payment to Chadwick of \$400 for his services in so buying, and a certain further sum of \$200 within sixty days after he should have obtained an assignment of the mortgage from Munro ; and that if the plaintiff should make default in payment of the said sums, he, Chadwick, should

be at liberty to foreclose the plaintiff's equity of redemption in the lands, but he was not to sell the same under the power of sale in the mortgage: that Munro knew that this was the agreement on which Chadwick purchased: that after Chadwick had so purchased the mortgage, the plaintiff gave him his promissory notes for certain sums in part consideration of the purchase money, which notes had passed into the hands of third parties: that Chadwick failed to complete the purchase of the mortgage, and in October, 1880, Munro, with Chadwick's consent, sold it to the defendant Leys: that Leys had full knowledge and notice of the said agreement between Chadwick and the plaintiff, and purchased with such notice: that Leys now claimed to be entitled to the whole principal money secured by the mortgage, and interest, and had advertised the lands for sale: that since the date of the mortgage the plaintiff had made other conveyances of the land to the defendants Appelbe and Caston, by deeds absolute in form, but intended to operate only as mortgage. And the plaintiff prayed that an account might be taken of the amount due under the aforesaid agreement for the purchase of the mortgage by Chadwick for him, and that he might be let in to redeem on payment of what should be so found due, and that on payment of the said promissory notes, and of what might be found due to Leys in addition thereto (if any) the mortgage might be discharged: that Leys might be restrained from selling the lands in the meanwhile: that an account might also be taken of what was due to Appelbe and Caston on their securities, and that they might be ordered to reconvey on payment thereof; for costs of suit, and general relief.

The defendant Leys, in his defence, claimed to be a *bond fide* purchaser for value without notice.

The case was heard at the sittings of the Chancery Division, at Toronto, on May 13th, 1884, before Proudfoot, J., who gave judgment, holding the defendant Leys entitled to hold the mortgage for the whole amount due upon it. In the course of his judgment his Lordship said:

" My impression is, that a writing is necessary in order to have a trust enforced such as the plaintiff seeks to have enforced against Chadwick ; but supposing a writing not to be necessary, then the frame of the bill is that the agreement may be specifically performed, the agreement by which Chadwick undertook to buy this mortgage for the plaintiff ; and that Leys being affected with notice of that agreement, ought to be bound in the same manner. The plaintiff has not proceeded upon the original mortgage transaction at all. If so, he ought to be bound to redeem whatever is due upon that mortgage. He asks now not redemption but a specific performance of the agreement, and in that character he ought to be regarded. The plaintiff, I must take it, has failed to establish that which I think is an essential point in his case, failed to establish that Leys had notice or is affected by this agreement. I think the plaintiff has failed to establish any right to enforce this agreement as against Leys, and if he asks to redeem he must redeem the original mortgage. I think Mr. Leys is entitled to hold the mortgage for the whole amount due upon it."

Afterwards on the 4th day of Septempter, 1884, the plaintiff appealed to the Divisional Court.

D. B. Read, Q. C., and W. Read, for the plaintiff. We say that Leys takes the mortgage subject to all the equities, and cite *Ryckman v. Canada Life Assurance Co.*, 17 Gr. 550; *Elliott v. McConnell*, 21 Gr. 276; *Baskerville v. Otterson*, 20 Gr. 379; *Smart v. McEwan*, 18 Gr. 623; *Lane v. Jackson*, 20 Beav. 535; *Wright v. Rankin*, 18 Gr. 625; *Goff v. Lister*, 14 Gr. 451; *Presser v. Trotter*, 26 Gr. 154; *Nant-y-Glo &c. Iron Works Co. v. Tamplin*, 35 L. T. 125; *Judd v. Green*, 33 L. T. 597; *Fisher on Mortgages*, 4th ed., secs. 847, 8-853, 1442; *McDougall v. Campbell*, 6 S. C. 502; *Batchelor v. Middleton*, 6 Ha. 75; *Wilson v. Kyle*, 28 Gr. 104; *Court v. Holland*, 29 Gr. 19; *Totten v. Douglas*, 18 Gr. 341; *Coote on Mortg.*, 4th ed., p. 659.

J. MacLennan, Q. C., and Ruttan, for the defendant, *Ryckman v. Canada Life Assurance Co.* is not according to law now, because a *chose in action* is by statute rendered assignable at law. Wright has no equity which he could enforce, because the trust was not in writing within the Statute of Frauds. We ask leave to set up the Statute of Frauds and the Registry Act. We refer to *Otter v. Lord Vaux*, 2 K. & J. 650; *S. C. in App.* 6 DeG. M. & G. 638; *Peterkin v. McFarlane*, 6 A. R. 254; *Greenstreet v. Paris*, 21 Gr. 229.

D. B. Read, in reply. The Statute of Frauds is got rid of by the advance of money from Wright to Chadwick to pay Munro.

September 5th, 1884. *Boyd, C.*—The agreement relied upon between Chadwick and Wright that the former should buy in the mortgage made by Wright, and hold it in trust for him, was one which in my judgment falls within the Statute of Frauds, and should have been in writing: *Benbow v. Townsend*, 1 M. & K. 506; *Wilde v. Wilde*, 20 Gr. 521. The agreement was not one which affected the state of the mortgage account, but, if valid, it gave an equity to the plaintiff to redeem for the amount paid by Chadwick arising out of the personal disqualification of the trustee to hold it for a larger sum against his *cestui que trust*. Chadwick was to be not the assignee but the trustee of the mortgage. So far as he is concerned the manner of accounting would proceed upon not what was due on the footing of the mortgage, but how much he had advanced to purchase it. As against Leys, who bought without notice of this arrangement, the pretensions of the plaintiff cannot be effectively asserted, first, because the agreement should have been but was not in writing, and secondly, because this is not one of the equities which attach upon the assignment of a mortgage. The distinction between equities like this growing out of the personal relations of the mortgagor and the purchaser of the mortgage, and those which affect the state of the mortgage account, are recognized in the

cases referred to during the argument of *Nant-y-Glo &c. Ironworks Co. v. Tamplin*, 35 L. T. 125; *Judd v. Green*, 33 L. T. 597; and *Davis v. Hawke*, 4 Gr. 394. I put the case in the most favourable way for the plaintiff in thus regarding it (more so perhaps than his own pleadings would warrant), and I cannot avoid the conclusion that the judgment appealed from should be affirmed, with costs.

FERGUSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

RE COLE AND THE CANADA FIRE AND MARINE INSURANCE COMPANY.

CLOSE'S CASE.

Company—Winding up—Contributory—Laches—Delay in consummating transfer of shares on books of the company—45 Vic. c. 23, D.

C. purchased shares in a certain company in 1878; but the papers required to make a formal transfer to him in the books of the company, were not furnished to the company till December 20th, 1881. On February 11th, 1882, C.'s name was entered on the list of shareholders, but there was no formal approval of the transfer by the Board of Directors until May 10th, 1883. Before this, however, on November 16th, 1882, C. was notified of a call on the shares for which he was sued, and defended the action, but the action for some reason not explained, was not proceeded with. This was the first intimation C. received that the papers furnished by him had been acted upon, but he appeared to have made no enquiries from the company subsequently to December 20th, 1881. The company ceased to do business on May 13th, 1883, and the winding up order was made on October 9th, 1883. It did not appear that C. had taken any steps to repudiate his position as a shareholder before these winding up proceedings; nor did he show any prejudice resulting to him from the failure of the company to notify him that the transfer to his name had been actually consummated on the books of the company.
Held, that under the above circumstances C. was rightly placed on the list of contributories in the winding up proceedings.
Sicell's Case, L. R. 3 Ch. 119, distinguished.

THIS was an appeal from the decision of Master O'Reilly at Hamilton by one P. G. Close, placing the said Close on the list of contributories of the Canada Fire and

Marine Insurance company, which was being wound up. The winding up order was made on October 9th, 1883, on a petition presented by Isaac I. Cole, assignee of the estate and effects of C. F. Dielman & Co., on behalf of himself and other creditors of the company, under the provisions of 45 Vic., c. 23, D. It referred it to the Master at Hamilton to appoint a liquidator, and to settle the list of contributories, and make all necessary inquiries and reports for the winding up of the company under the provisions of the Act.

The liquidator, having been duly appointed, and having filed a list of contributories of the company in the Master's office, among whom was placed the present appellant, the Master on March 24th, 1884, proceeded to settle the same. Close's name was inserted as contributory in respect of thirty shares, and on May 31st, 1884, the Master gave judgment in respect to him as follows:

"The circumstances connected with this case are substantially as follows : A Mr. T. H. Marsh, of the firm of McNab, Marsh & Coon, subscribed for thirty shares of stock in the Canada Fire and Marine Insurance Company. McNab, Marsh & Coon failed, and John Turner became the assignee of that firm under the insolvency law, and P. G. Close, being sworn before me on his own behalf, testifies that he purchased these thirty shares from said Turner, assignee, etc., some time before July 8th, 1882. He further testifies that he authorized A. J. Close to write a letter to the accountant of the company to ascertain either the value of these shares, or if they could be sold, he could not say which. And on seeing a copy of a letter (or what purported to be a copy of a letter) from Charles D. Cory, the manager of the company, dated July 9th, 1878, to A. J. Close, he says that Cory's said letter must be an answer to the letter which he got A. J. Close to write for him to the accountant. (a).

In the company's ledger we find these thirty shares standing in the name of T. H. Marsh, the original subscriber. I did not quite understand whether the circumstance was referred to as evidence that the shares still belonged to Marsh, and not to Close, or not. But obviously it could not be evidence that the shares had not been transferred subsequently to P. G. Close. It appears that from various causes, such as the want of

(a). This letter was as follows :

Hamilton, July 9th, 1878.

A. J. CLOSE & CO., Toronto. Dear Sir.—In reply to yours of the 8th. There are no offerings here for stock just at present. There have been but few sales this year. Should say that party would do better to hold on to the stock until fall. Yours truly,

CHAS. D. CORY, Manager.

powers of attorney, the absence of the attorney named, &c. &c., considerable delay occurred before the shares were actually transferred in the company's books. But they were duly transferred first to J. Turner, assignee in insolvency of McNab, Marsh & Coon, and afterwards from said Turner to P. G. Close, and these transfers were duly accepted by the transferees respectively (including said Close) and now stand in the books of the company in the name of said P. G. Close. Close swears that he could have sold the shares at one time for more than he gave for them. But even if this delay was shewn to be the result of the company's negligence (which is not by any means clear) and assuming, also, that Close (if all had been right on the company's books) would have closed with the advantageous offer he refers to, he cannot get rid of his liability as a shareholder when the rights of creditors intervene. I therefore put him on the list of contributories for thirty shares.

A notice of appeal to the Judge in Chambers was forthwith served on behalf of the said P. G. Close, from this decision, in which the grounds of appeal were stated as follows:

1. The said judgment or decision is wrong, inasmuch as the evidence before the said Master established the fact that the said Close was not and never had been either in fact or in law a shareholder of the company.
2. The attempted transfers on the books of the said company whereby the said Close appears to have been made a shareholder, if at all, were made after the said Close had repudiated any liability in respect of such shares, and at a time when the question as to whether the said Close was a shareholder or not was actually in litigation, and could not and cannot therefore affect the position of the said Close, which should have been determined with regard to a period *ante rem motam*.
3. The company having refused from the beginning to recognize or treat the said Close as a shareholder, and all negotiations in respect thereof having terminated, it was necessary that the transfers aforesaid, and the fact that the company was desirous of placing the said Close in the position of a shareholder, should be communicated to the said Close (which was never in fact done) and that he should assent thereto, (which he never in fact did) before the said Close could become a shareholder.

The rest of the facts of the case sufficiently appear from the judgment of Boyd, C.

The petition was presented and argued on October 23rd, 1884.

Shepley, for the appellant, referred to *Re Joint Stock Discount Co., Sichell's Case*, L. R. 3 Ch. 119; *In re London, etc., Bank, Ward and Henry's Case*, ib., 2 Ch. 431; *Nasmith v. Manning*, 5 S. C. R. 417.

Laidlaw for the company, the liquidator, and creditors, referred to 32-33 Vic. c. 12, s. 25, D.; *Evans v. Wood*, 5 Eq. 9.

Shepley in reply cited *In re Mexican and South American Company, Shewell's Case*, L. R. 2 Ch. 387; *In re Alexandra Park Company, Hart's Case*, Ib., 6 Eq. 512.

October 29th, 1884.—BOYD, C.—The papers required to make a formal transfer of shares to the appellant Close in the books of the company were not complete and were not furnished to the company till December 20th, 1881. The shares had been purchased by Close early in 1878, so that there was considerable delay in supplying these materials, as both parties very well knew.

I think the Master's conclusion may be accepted as right that these papers were acted on February 11th, 1882, Close's name being entered on the list of shareholders, although there does not appear to be any formal action of the board approving of the transfer of shares to Close till May 10th, 1883. But before this a call had been made upon Close as a shareholder, of which he was notified on November 15th, 1882. (b.)

(b.) This refers to the following letter :

HAMILTON, November 15th, 1882.

P. G. CLOSE, Esq., Toronto. Dear Sir,—On the 7th day of February last, a resolution was adopted by the Board of Directors of the Canada Fire and Marine Insurance Company, ordering a call of five per cent. to be made upon each share of the subscribed capital stock of the company, payable on or before April 17th, 1882, of which you were duly notified by circular, dated March 12th, 1882.

You were also notified by circular dated September 11th, 1882, that the Board of Directors, after an examination of the assets and liabilities of the company, had decided that their call of five per cent. above referred to be collected, and I have been instructed to place all disputed calls in the hands of the company's solicitor for collection.

There are thirty shares standing in your name on the books of the company, a call on which will amount to \$150, and I am instructed by the Board to notify you that if the said sum is not paid to me on or before the 25th of November, current, it will at once be placed in the hands of our solicitor for collection, and proceedings for the recovery of the call will be commenced and expenses incurred without any further notice to you.

Your's, &c.,

GEORGE DOON, Secretary.

This was the first intimation received by him that the papers transmitted by him had been acted upon, but he appears to have made no further inquiry from the company after December 20th, 1881.

The company ceased to do business on May 13th, 1883, and the winding up order was made October 9th, 1883.

He was sued for this call, and defended the action, which appears not to have been further prosecuted. It is said that this action was brought on December 21st, 1882, but there is no evidence of this, nor of the reason why it was not proceeded with, nor of the line of defence set up by the present appellant.

Regarding the leisurely way of dealing between the parties, I would not infer any unreasonable delay in putting Close's name on the list of shareholders. The papers required for transfer was not completed till three years and a half after he purchased the stock from Turner, and there was an interval of a little over a month and a half from the receipt of these papers till he was entered as a shareholder. He was then informed of his standing as a shareholder eight months afterwards, and so far as appears took no steps to repudiate this position. I cannot conclude that because he defended an action for the call, therefore he repudiated the status of shareholder, as was argued, for I have no evidence of what his ground of defence was. The facts thus stated would lead me to agree with the Master's conclusion, that he is rightly made a contributory.

The appellant relied on *Sichell's Case*, L. R. 3 Ch. 119, but there through the default of the company the transfer had not been registered before the winding up, and the Court refused to relieve actively the body in default by rectifying the register and adding an alleged contributory. Here the company is not in default and the appellant was dealt with as a shareholder, and the formal transfer made to him before the winding up. Instead of the *onus* being on the liquidator to have the *laches* of the company remedied, the *onus* is here upon the appellant to expunge his name as shareholder from the books of the company.

There is no equity that I can discover to have the appellant's name removed. He bought the shares and applied for a transfer to him, which the company granted. He intended to become a shareholder and the company intended to accept him, and he shews no prejudice from the failure of the company to notify him that the transfer to his name had been actually consummated on the books of the company. He could have ascertained that this had been done at any moment, and when the call is made he takes no steps to repudiate or have his name struck out of the list of shareholders till this appeal is made from the Master.

The appeal should be dismissed, with costs.

Many of the cases are collected and the result given in *Lindley* on Partn., 3rd ed., p. 1443.

A. H. F. L.

[COMMON PLEAS DIVISION.]

IN RE BEEMER AND THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF THE VILLAGE OF GRIMSBY AND THE CORPORATION OF THE VILLAGE OF GRIMSBY.

Ways—Municipal corporations—Roads opened up on lands adjacent to road allowance—Road allowance taken by owners of such lands—Right to open up road allowance—Compensation—44 Vic. ch. 241, secs. 15, 16.

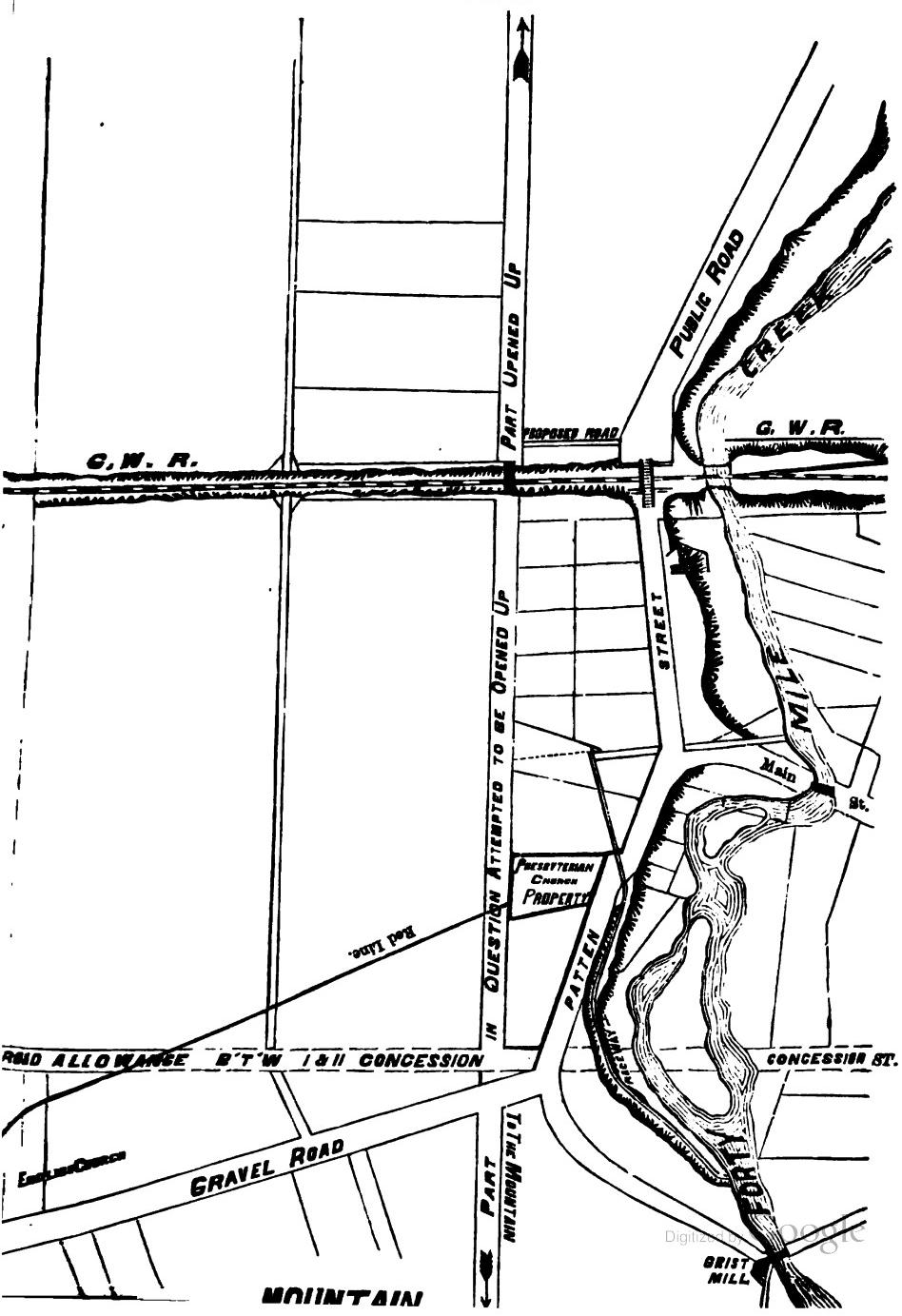
Where, on lots closely adjoining original road allowances, roads were laid out and used as public roads during the whole of the present century, the original road allowances having been, during that time, in the occupation of the original owners of the lots and those claiming under them, and used and treated as their own property, the presumption being that they were taken and used in lieu of the roads opened through their land and without any compensation being paid therefor.

Held, that a by-law passed by the municipal corporation to open such original road allowance as of right was invalid, and must be quashed. It was contended that since the passing of 44 Vic. ch. 241, seca. 15, 16, O., the only remedy for persons claiming an interest in a road allowance was by arbitration to fix compensation; but

Held, that the Act only applies to the case where the council have in good faith intended to open a road allowance, but by mistake have not done so on the true line.

ON the 28th July, 1884, George Murray obtained an order *nisi* calling upon the corporation of the village of Grimsby to shew cause why by-law No. 40 of the said village, passed on the 30th July, 1883, entitled a by-law to provide for the opening of a portion of the original allowance for road between lots 10 and 11 through portions of the first concession of the township of Grimsby, now in the incorporated village of Grimsby, should not be quashed with costs, on the ground (among others) that a travelled road instead of the original road allowance between said lots having been laid out and opened on said lot No. 10 sufficient for the purposes of a public highway, and for which no compensation was or has been paid to the owners of the lands appropriated to such highway, the applicants, the trustees and other owners are entitled to such original road allowance in lieu of the road so laid out, for which no compensation was paid, &c.

The plan on the next page may be referred to:—

LAKE ONTARIO

On September 30, 1884, *Maclennan, Q. C., and G. Murray*, supported the order *nisi* and referred to: *Burritt and Corporation of Marlborough*, 29 U. C. R. 119; *Re Webster and Corporation of West Flamborough*, 35 U. C. R. 590; *Hewison and Corporation of Pembroke*, 6 O. R. 170.

Aylesworth, contra, referred to Municipal Act 1883, secs. 549, 551; *Winter v. Keown*, 22 U. C. R. 345; *Cameron v. Wait*, 27 C. P. 475, 3 A. R. 175; *Regina v. Hunt*, 16 C. P. 145; *Purdy v. Farley*, 10 U. C. R. 545; *Regina v. Plunkett*, 21 U. C. R. 536; *Regina v. Great Western R. W. Co.*, 32 U. C. R. 506; *Re Lawrence and Corporation of Thurlow*, 33 U. C. R. 223; *Scarlett v. Corporation of York*, 14 C. P. 161.

November 22, 1884. OSLER, J. A.—The road allowance in question runs in a general southerly direction from Lake Ontario to the foot of the mountain, crossing as it approaches the latter, the original allowance for road between the first and second concessions, and the Queenston and Grimsby Gravel Road. It has for nine years been opened and in use from Lake Ontario to the northerly side of the line of the Grand Trunk Railway (G. W. R. Division) which runs east and west through the village. From the southerly line of the railway to the mountain it has never been opened, and that is the part to which the by-law in question relates. It is in possession of the owners of lands adjoining it on the east, and, among others, of the present applicants, whose property to the south and east is bounded by a street called Patten street running in an irregular direction between the railway on the east and a street called Concession street (which appears to be part of the road allowance between the first and second concessions) on the west, at the latter point entering a road known as the Queenston and Grimsby Gravel Road, and at the former, after crossing the railway by a bridge, continuing into another public road leading in an irregular direction easterly to the lake. Another street called Main street enters, but does not cross Patten street about midway between the railway line and

Concession street. It seems to have been some times called West Main street from that point along Patten street westerly to the Gravel Road. East or south east of Patten street and running in a south easterly direction into the lake runs a creek called the Forty Mile Creek, at one point of which south of Concession street is a grist mill, from which in a northerly direction a road extends to the Gravel Road entering it opposite to the point where Patten street enters it, that point being a point immediately south of Concession street.

[The learned Judge then stated the evidence and continued.]

The evidence seems to me to establish with reasonable certainty that from the beginning of the century an open and travelled public highway has existed running from Nelles' mills, at first in a northerly, and afterwards in an easterly direction, along the west side of the Forty Mile Creek to Lake Ontario, such road being in lot No. 10, and that part of it between the railway line on the north-east and concession street on the north-west, being now known as Patten street, or West Main street and Patten street, or perhaps in one part as a continuation of the Queenston and Grimsby road, and in the other part Patten street. Between the road thus described and that part of the road allowance in question there is a narrow strip of land, being part of lot 10, of irregular shape, on the south-west about one chain and five links, in the middle about five chains and ninety links, and in the north-east about 104 feet in depth, adjoining the road allowance on the west and Patten street, as I will call it, on the east. A part of this strip of land is the property of the applicants, the trustees of the church, and together with a part of the road allowance has been in their use and possession for the purpose of a church and church yard since the year 1833. The whole of this part of the road allowance has always been in possession either of the owners of lot 10 or of lot 11.

The Queenston and Grimsby gravel road is another ancient highway, which in the early part of the century

seems in one part of its course to have passed through the upper or westerly part of lot 10, leading from Patten or West Main street, at a point about where the church property now is, and thence in a westerly direction and north of the allowance for road between the first and second concessions through lot 11, as shewn by the red line on plan A. Many years however, before the applicants acquired their property, that part of its course was altered and it was taken just south of the road allowance last referred to into the next concession, and entered Patten or West Main street at about the point where the road leading from Nelles's mill northerly entered that street. The road allowance between the first and second concessions, until south of Patten street it becomes Concession street, has never been opened for travel, but remains in the possession of the owners of the adjoining lot or lots.

It thus appears that two public roads, closely adjoining original allowances for road, have been laid out on these two lots, 10 and 11, which, with a change in the direction of the road crossing the latter, not affecting in any way that crossing the former, have been in use, as I may say, during the whole of this century; and that for all of that time which the oldest inhabitants can remember, the road allowances adjacent to the roads in question have been in the occupation of the original owners of the lots in which the roads were laid out, and those claiming under them, and treated and used in all respects as their own property.

It is in the last degree improbable that in those early days compensation was paid for the land thus taken for the road; the road allowance being useless, the proprietor would in the natural course of things, take possession of it in lieu of the road opened through his own land.

The presumption arising from the position of the roads and road allowances, the lapse of time and long continued possession of the latter, seems to me much stronger than that to which effect was given in the case of *Burritt and Corporation of Marlborough*, 29 U. C. R. 119; or *Re Webster and Corporation of West Flamborough*, 35 U.C. R. 590.

On the argument I derived the impression, which a perusal of the affidavits shews to have been erroneous, that Patten street had been for the first time laid out by Mr. Brownjohn in 1860. It appears that he only gave it that name then when laying out the adjacent property for his employer. It was at that time an ancient highway, which existed at the time when the Queenston and Grimsby road ran in its former course.

There is nothing in Mr. Morse's affidavit which conflicts with the presumption I have referred to. In the absence of any evidence of the facts on which the council as he says. "satisfied themselves" that the side road allowance had not been taken in lieu of this road, I cannot regard it as of any weight.

Mr. Aylesworth argued that since the Act 44 Vic. ch. 241, secs. 15 and 16, O., *Burritt and Corporation of Marlborough* would not apply, and that the only remedy for persons claiming an interest in a road allowance was by arbitration to fix the compensation.

That Act, as I read it, only relates to a case where the council have in good faith intended to open a road allowance, but by mistake have not done so on the true line. It does not touch a case such as this, where they profess to open it as of right, denying that any one has acquired a title to it under sec. 531, or corresponding sections of former Municipal Acts. They may be able to pass a by-law for taking this land and laying down a road thereon, by the same or another by-law providing for compensation to the owners. But the by-law now in question, which purports to open the road allowance as of right, ought, in my opinion, to be quashed, with costs, other than the costs of those affidavits and parts of affidavits which do not relate to the objections to which I give effect.

Order absolute.

[COMMON PLEAS DIVISION.]

THE CORPORATION OF THE TOWN OF STRATFORD V. WILSON

Municipal corporations—Agreement with officer to account for fees received outside of his office--Validity.

The plaintiffs appointed the defendant chief of police of the town of Stratford, at a named salary, but stipulated that he should act as county constable within the town only, and account for and pay over to the plaintiffs all fees received by him from the county as a reward for services performed by him as county constable.

Held, that under 5 and 6 Edw. VI. ch. 16, and 49 Geo. III. ch. 126, the agreement to account for such fees was invalid.

Quere, whether the plaintiffs, or the Board of Police Commissioners, had the power to appoint the defendant; and whether, apart from the statutes above mentioned, it was not *ultra vires* of the plaintiffs to bargain with the defendant for the accounting to them for the fees of another office not under their control.

THIS was an action tried before ROSE, J., without a jury, at Stratford, at the Fall Assizes of 1884.

The evidence sufficiently appears from the judgment.

Woods and Smith, for the plaintiffs.

Idington, Q. C., for the defendant.

December 3, 1884. ROSE, J.—The claim in this action is for fees received by the defendant as county constable from the county of Perth.

The plaintiffs say that they are entitled to them because the defendant earned them while he was Chief of Police of the town at a fixed yearly salary under an agreement by which the defendant undertook to confine his labours as county constable to the area of the town, and to account to the plaintiffs for all fees received by him from the county for such services in the town as county constable.

The alleged intention of the plaintiffs was that the defendant was only to act as county constable so far as might be necessary to enable him to maintain order and enforce the police regulations in the town.

The defendant claims that the plaintiffs are not entitled to recover, on the following grounds :

1. That the defendant was appointed by the Board of Police Commissioners brought into existence under 32 Vic. ch. 6, sec 15, O. (36 Vic. ch. 48, sec. 333): that the Police Magistrate was appointed in 1873, prior to the coming into force of 37 Vic. ch. 16, sec. 10, O., by which sec. 333 was repealed : that the power of appointing the Chief of Police for Stratford vested in the Police Commissioners immediately upon the appointment of the Police Magistrate, and that the council of the town not having dissolved the board under sec. 13 of 37 Vic., it has always remained in existence, and therefore the plaintiffs had not at any time the power of appointing the defendant; and the agreement on that ground was not operative.

2. Even if the plaintiff had the power to appoint the defendant, the agreement was void as being (*a*) contrary to the provisions against champerty and maintenance, (*b*) a buying and selling of offices contrary to the provisions of 5 and 6 Ed. VI. ch. 16, and 49 Geo. III. ch. 126.

3. That apart from these statutes it was *ultra vires* of the plaintiffs, they not having the power to make a bargain with the defendant involving the accounting for fees received by him for performing the duties of another and distinct office not under the plaintiffs' control or authority.

The defendant referred in this connection to the provisions of sec. 23 of 47 Vic. ch. 32, O., as a legislative declaration of the non-existence of such power prior to the passing of that Act.

The defendant by way of counter claim seeks to recover damages for malicious prosecution, and also a reward for apprehension of criminals, as set out in the pleadings.

I formed an opinion at the trial adverse to the defendant's right to recover under his counter-claim, but gave no decision. The defendant's counsel however said if I were with him on any of the grounds of defence he did not desire to press his counter-claim, as he only relied on it as a shield in case he failed in his defence. He indicated the line of evidence as to malicious prosecution, but in deference to my opinion did not further press the point.

I did not consider the statement of account of the plaintiffs' claim. If the plaintiffs are held entitled to recover, the question of account is to be referred to some person to be agreed upon, failing such agreement then to be appointed by myself for the Court after hearing counsel.

The first and third grounds taken by the defendant present serious difficulties to the plaintiffs' right to recover, but in the view I have taken as to the objection founded on the provisions of the statutes of Edward and George it will not be necessary to further consider them.

The by-law under which the defendant was appointed by the plaintiff is numbered 217 for the year 1876.

It provided, *inter alia*, "that William B. Wilson be chief constable of the town, and that his salary be \$600 per annum, and that he devote his whole time to the police duties of the town, and account to the town treasurer for all fees that may accrue to him in the discharge of his duties as constable, and that he be required to report himself every morning (Sundays excepted) at ten o'clock in the forenoon, and enter in a book provided for that purpose what police duties he has performed for the previous twenty-four hours, and shall be subject to the instructions of the Police Commissioners."

By-law No. 235, for 1877, re-appointed him for that year. The provision is similar to that of 1876, with the exception that he is made "subject to the instructions of the mayor and council."

In 1878 the wording of the by-law was changed. Counsel did not argue that it was intended to place defendant's engagement on substantially different terms. The language is not well considered, and only by reference to preceding by-laws can one apprehend its meaning. It is No. 255, and is as follows: "That W. B. Wilson be chief constable at a salary of \$700, and that the amount include all and any fees received by him from town and county, or from any source whatever, such fees to be refunded to the town."

The language is not carefully chosen. "Received by

him." In what capacity? "From town." Was he to do work for fees for the town? "From any source whatever." To what does this point? "Fees to be refunded to the town." "Refunded" cannot apply to fees received from the county.

I deal with this by-law as it was dealt with by counsel at the trial, as re-appointing the defendant on the same terms as theretofore, and that his salary was increased to \$700.

In 1879 his salary was reduced to \$550 by by-law 288, which enacted that W. B. Wilson be chief constable at a salary of \$550, such sum to include all or any fees collected by him as such constable from every or any source, town, county or otherwise.

This by-law taken alone would make it difficult to determine what the plaintiffs really meant. It might be contended that the town would pay him such sum as with all his other fees would amount to \$550. There is no express provision for repayment or payment over. The plaintiffs did in fact pay him his salary, and are now seeking not a repayment of excess over all other fees, but a payment over to them of fees collected by him from the county.

I think I may take the meaning to be that it was a re-appointment on similar terms save as to salary. This is the construction put upon it by the parties.

In 1880, the defendant was re-appointed under by-law No. 298. The language is the same as that of 288, save that the salary is increased to \$600.

By-law 314 for 1881 is similar to 298, save that defendant is described as chief of police, instead of chief constable.

By-law No. 342 for 1882 is similar to 314.

In 1883 by-law No. 354 re-appoints him in these terms: "That W. B. Wilson be the chief of police with duties as heretofore, and collector of poll-tax, at a salary of \$600."

Unless by the words, "with duties as heretofore," no reference is made to the salary or fees collected from the county or otherwise.

If the view I take of the law does not on further consideration prevail, it will be necessary to more carefully consider the true construction of these by-laws.

For the present I adopt substantially the construction placed upon them by the plaintiffs in paragraphs 3 and 4 of the statement of claim, *i. e.*, that they evidence an agreement between the plaintiffs and defendant that defendant should act as chief of the police for the town at a fixed salary, and should account for and pay over all fees received by the defendant from the county as a reward for services performed by him as county constable.

Paragraph 5 of the statement of claim may, for the purpose of determining this question, be also taken as proven, with the additional statement of fact that the defendant vouched each account rendered attesting its correctness under oath.

As I have indicated, the plaintiffs paid the defendant his salary annually, and the defendant periodically sent in his accounts to the county for services rendered as county constable. The county paid the defendant the amounts allowed.

This is not an action by the defendant for his salary, but an action by the town for the fees received by defendant as county constable.

Whether if the defendant had been plaintiff suing for his salary the town might have successfully defended, we need not consider. We must determine whether the plaintiffs can obtain the fees earned by the defendant as county constable and received by him out of a fund not in any wise belonging to or controlled by the town.

The case of *Palmer v. Bate*, 2 B. & B. 673, 6 Moore 28, was decided under the Statute Edw.VI. The head note is as follows: "An assignment to trustees of all the emoluments and property which, during the lifetime of A., and his continuing to hold the office of clerk of the peace, should arise or become due to him as clerk of the peace, or in respect of his office, after deducting the salary or allowance of his deputy for the time being, upon trust to pay

the interest arising on certain debts due from A., and from time to time render the surplus and residue, after satisfying the trusts, to A., is invalid."

The opinion of the Judges Dallas, L. C. J., and Park, Burrough, and Richardson, JJ., was given on a case stated for the opinion of the Court by the Vice-Chancellor on the 3rd of June, 1820.

The learned Judges gave a certificate of opinion, but no reasons for the opinion. Such reasons as appear are found in the report of the argument.

The certificate was as follows: "This case has been argued before us by counsel. We have considered it, and are of opinion, that the assignment of the income, emolument, produce, and profits of the office or place of clerk of the peace for Westminster, after deducting the salary or allowance of the deputy for the time being * * is not a good or effectual assignment, nor valid in law. * * ."

The statute of 49 Geo. III. ch. 126, sec. 1, recites secs. 2, 3, 4, 5 and 7 of 5 & 6 ed. V. ch. 16, and extends its provisions to all offices in the gift of the Crown, &c.

Section 3 enacts: That if any person * * shall by any way, means, or device, contract or agree to give or pay any money, fee, * * directly or indirectly, for any office, commission, place or employment specified or described in the said recited Act, or this Act, or within the true intent or meaning of the said Act, or this Act, or for any deputation thereto, or for any part parcel, or participation of the profits thereof, * * every such person, and also every person who shall wilfully and knowingly aid, abet," &c., "therein, shall be deemed and adjudged guilty of a misdemeanor."

The case of *Regina v. Charrette*, 13 Q. B. 447, is a case under this Act, in which it was held to apply to the sale of an East India directors' nomination to a cadetship.

It was not disputed on the argument that the provisions of these statutes were in force in this Province.

The cases of *Regina v. Mercer*, 17 U. C. R. 602; *Regina v. Moodie*, 20 U. C. R. 389, and the earlier case of *Foot v.*

Bullock, 4 U. C. R. 480, may be referred to on that point.

I am unable to distinguish this case in principle from *Palmer v. Bate*, or to find facts which would take it out of the express provisions of 49 Geo. III.

I therefore think the defendant is entitled to succeed in his defence, and to judgment in his favour, with costs.

In addition to the authorities above referred to, the following were cited: *Godolphin v. Tudor*, 1 Salk. 468; *Greville v. Atkins*, 9 B. & C. 462; *Hopkins v. Prescott*, 4 C. B. 578; *Hughes v. Statham*, 6 D. & R. 219, 4 B. & C. 187; *Pringle v. McDonald*, 10 U. C. R. 254; *Jarvis v. Great Western R. W. Co.*, 8 U. C. R. 280; *Prince v. Corporation of Toronto*, 25 U. C. R. 175; Interpretation Act, ch. 1, sec. 8, sub-sec. 41.

As to reward claimed: 42 Vic. ch. 31, sec. 31, O.; 46 Vic. ch. 18, sec. 484, O.

[COMMON PLEAS DIVISION]

MCKENZIE V. McGLAUGHLIN.

Lease—Parol agreement to vary—License—Right to revoke—Estoppel by conduct.

The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not made part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain rough shelving, &c., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in.

Held, that the evidence of such agreement was not admissible, as it would add to the written agreement, and was not collateral thereto : but even if admissible ; if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also that the evidence failed to establish the alleged agreement, and that the plaintiff was not estopped from denying it.

THIS was an action tried before Patterson, J. A., without a jury, at London, at the Fall Assizes of 1884, when judgment was entered for the plaintiff.

The facts fully appear from the judgment.

During Michaelmas sittings *Moss*, Q. C., moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

During the same sittings, November 26, 1884, *Moss*, Q. C., supported the motion. The portion of the premises in question were excepted from the lease; but prior to accepting the lease there was an express parol agreement that the defendant was to have the right to put the show cases upon the excepted portion during the continuance of the term, so as to add to the appearance of the shop, and thus benefit the plaintiff in his business. It was part of the arrange-

ment on entering into the lease. It was, therefore, a permission or license for a definite time, namely, during the continuance of the term, and was not revocable, and it did not require to be in writing : *Cornish v. Stubbs*, L. R. 5 C. P. 334 ; *Wood v. Lake*, Sayer's R. 3 ; *Wood v. Manley*, 11 A. & E. 34 ; *Mellor v. Watkins*, L. R. 9 Q. B. 400 ; *Gule on Easements*, 5th ed., 36 ; *Morgan v. Griffith*, L. R. 6 Ex. 70 ; *Hodgson v. Johnson*, E. B. & E. 685. The learned Judge has expressly found that there was an assent. There was also an expenditure of money on the faith of the license, and therefore it cannot be revoked, at least without tendering the amount of the expenditure incurred : *Winter v. Brockwell*, 8 East 308 ; *Morgan v. Lailey*, 33 U. C. R. 369. And in any event it could only be revoked after reasonable notice. The plaintiff is also estopped by his conduct from demanding the removal of the show cases until the expiration of the term : *Carncross v. Lorimer*, 3 McQ. H. L. 829 ; *Pickard v. Sears*, 6 A. & E. 469.

McCarthy, Q. C., contra. The whole question is one of fact, and the learned Judge has found against the defendant. On the pleadings no license was set up, but merely a collateral agreement. The learned Judge has found that there was no collateral agreement, but merely an assent, and that such assent was revoked. But even if it amounted to a license, it was merely a revocable license, and was revoked. If the license was not revocable it must amount to an interest in land, which should therefore have been in writing. No estoppel arises from the plaintiff's conduct.

December 20, 1884. ROSE, J.—In this case the plaintiff leased to the defendant for a term of four years certain premises in the city of London, being a store occupied at the time of the demise by the plaintiff, a dealer in sewing machines, "save and except the bottom portion of the east window in front of said store, also save and except a portion of said store described as follows: commencing at the north-east corner of said store, thence south along the

eastern wall of said store 10 ft. 10 in., thence westerly 5 ft., thence southerly 16 ft., thence easterly 5 ft. to the said eastern wall of said store, thence northerly along the said wall to the place of beginning."

The lease provided that "the said lessor is to occupy the portion of the said store reserved to himself only during business hours, namely from 7 o'clock a.m. till 6 o'clock p.m. during Monday, Tuesday, Wednesday, Thursday, and Friday; and from 7 o'clock a.m. till 10 o'clock p.m. on Saturday of each week, and will not allow any person other than himself to carry a key of the said store (without the consent of the said lessee first had and obtained for that purpose), and further will not employ any person or persons (except his wife and present apprentice) in the said store, or allow any person or persons to remain or stay or work in same (except as aforesaid); and further will not do or commit, or cause to be done or committed, any act, deed, or thing which will injure the lessee or his business."

It will be observed that while the portion of the premises to be occupied by the plaintiff is thus excepted from the grant, there is a specific agreement as to its occupation by the plaintiff, and the control over the same by the defendant.

The defendant was to carry on the business of a jeweller, which he was at the date of the lease carrying on in other premises, using in his business a number of show cases, some on stands or feet and some affixed to the wall.

These cases, or a number sufficient to fill the store, the defendant removed to the demised premises, and placed them there.

The plaintiff required him to remove them, and on the 24th of December, through his solicitor, formally notified him to do so "at once," threatening unless he did so he would commence proceedings to enforce his rights. This demand was not complied with, and on the 2nd of January this action was commenced.

The defendant resists the demand on the ground that there was an agreement made prior to accepting the lease and entering into the consideration for its acceptance, independent and collateral, and by distinct agreement not made part of the writing, to the effect that the defendant was to have permission or license to bring these show cases upon the portion of the premises excepted from the lease, so as to add to the appearance of the store, and thus benefit the plaintiff in his business.

As I understood the defendant's contention it was this : that the portion of the premises in question being excepted from the demise it was perfectly competent to the parties to enter into an independent parol agreement with respect to the occupation of the same : that there had been an express agreement between the parties that the defendant might occupy the same with the cases during the currency of the lease : that such agreement amounted to a license, and hence might be by parol : that it was for a definite period and hence irrevocable ; and finally, that, if no agreement be shewn, the conduct of the plaintiff in allowing the defendant to go to expense and trouble to remove the cases from the premises where they were, and placing them where they now are, estopped him from demanding their removal prior to the expiry of the term.

The plaintiff, on the other hand, denies that there was any such agreement as alleged, and says the finding of the learned Judge is against it : that whether the plaintiff gave a revocable license or not is a question of fact, and the learned Judge has found such fact in favour of the plaintiff: that the agreement entered into was one with one consideration and reduced to writing, and the writing is the only evidence of it which can be received : that in order to constitute a binding collateral agreement the consideration for it must be separate ; and it must appear that the agreement was purposely made separate and collateral: that the license to be irrevocable must be coupled with the grant of an interest; and, if so, is not enforceable, not being in writing ; and if not coupled with

an interest it is revocable, and having been revoked the plaintiff is entitled to succeed, there having been given a reasonable time to remove after notice.

In the cases of *Wood v. Leadbitter*, 13 M. & W. 838, and *Mason v. Scott* (in appeal) 22 Gr. 592, may be found the principles of law which must govern this case.

The judgment of the Court in *Wood v. Leadbitter* was delivered by Alderson, B., and is most interesting.

The following propositions of law are found in the decision at pp. 842-8.

1. No incorporeal inheritance affecting land can either be created or transferred otherwise than by deed.

2. This principle does not depend on the quality of interest granted or transferred, but on the nature of the subject matter, "a right of common, for instance, which is a profit à prendre, or a right of way which is an easement, or right in the nature of an easement, can no more be granted or conveyed for life or for years, without a deed, than in fee simple."

3. A dispensation or license properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. But a license to hunt in a man's park and carry away the deer killed to his own use is a license as to the act of hunting, but as to the carrying away of the deer killed, is a grant.

4. A mere license is revocable, but if it comprises or is connected with a grant it is irrevocable.

5. A mere license under seal is as revocable as a license by parol; and on the other hand a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. If the grant is not capable of being made by parol then the license is a mere license, it is not incident to a valid grant and is therefore revocable. By way of example, a parol license to come on one's land and there to make a watercourse to flow on the land of the licensee, is a mere license, as there is no valid grant, and hence the license is revocable.

6. A mere license, though for profit, as to dig gravel, is revocable. So also is a mere license for a term certain, and it will make no difference that it is for a consideration.

Endeavouring to apply these principles to the case before us we find, according to the defendant's contention, a parol license to place show cases on the plaintiff's property for a consideration, and for a term certain. If the agreement set up by the defendant amounts to the grant of an easement or incorporeal right, then it should have been under seal, and not being under seal the license thus set up by the defendant is a parol license not incident to a valid grant, and hence is revocable; and the fact that it was for consideration and for a term certain would make no difference.

I am of the opinion, moreover, that evidence of the agreement set up by the defendant cannot be received.

Admitting that the premises in question are excepted from the lease, and that there is no reason in law why there could not be an independent collateral agreement respecting their occupation, we find by reference to the lease that there is an agreement in writing contained in the lease respecting such occupation.

Assume for the moment that the description in the lease of the premises demised had been by metes and bounds, making no reference to the excepted portion at all, so that the whole of the provisions as to the occupation of the demised premises could be read without in any way referring to the excepted portion, or take it, that the effect of the description as worded is the same as if the demised premises had been described by metes and bounds as above suggested, then we find contained in the paper writing, in which are found all the provisions of the lease, a separate and independent agreement as to the occupation of the excepted portion. This agreement may be read as follows: "As to the premises hereinafter described, it is hereby agreed that while the lessor has reserved the same for his own use and for the purpose of carrying on his business, yet as a consideration for the lessee accepting the

said lease and agreeing to pay the rent reserved thereby, the plaintiff shall occupy the same only during business hours, &c. (as in the provision hereinbefore set out)."

To this the defendant desires to add by parol that it was further agreed that he (the defendant) might occupy the premises so excepted by standing thereon and affixing thereto certain show cases. Is not that adding to a written agreement? I cannot see how the contrary can be well urged.

Then again, assume that we deal with the lease as an agreement in writing by which it is provided that as to certain premises the plaintiff was to occupy a portion and the defendant another portion, would it not be adding to or varying the same to permit the defendant to show a parol agreement that he was to be at liberty to occupy not only the portion expressly demised to him, but also the portion expressly reserved to the plaintiff?

It further appears to me doubtful whether the parol agreement set up can be called a collateral agreement.

If it was prior to or cotemporaneous with the writing, then, apart from the objections above suggested, the only consideration was the entering into the lease, *i. e.* the payment of the rent by the defendant. There would be, therefore, *one* consideration for the whole agreement. Again, if made after the writing there was no consideration. See the judgment of Harrison, C. J., in *Mason v. Scott*, 22 Gr. 592, at p. 621, where he asks: "How can an agreement be collateral to another when the one undivided and indivisible consideration is the foundation of both?"

It is further argued that the plaintiff has estopped himself from denying the right of the defendant to retain the cases in their places.

Admit that the conduct of the plaintiff has been such as to amount to an estoppel—what is the result? The plaintiff might be estopped from denying that the cases were rightfully placed where they are found, *i. e.*, that the plaintiff agreed that defendant might place them there, but this would not entitle the defendant to retain them

there for an indefinite time. If not, then for what time, until the end of the term? But would this amount to more than that the plaintiff would be estopped from denying that he had agreed with the defendant that he might place the cases in their position and retain them there until the end of the term? Would this amount to more than a license, and, if not, would not such license, for the reasons above given, be revocable?

It seems to me that if the agreement, if proven, would not entitle the defendant to succeed, he cannot succeed by shewing acts which prevent the plaintiff denying such agreement.

I cannot think that the defendant had not time, ample time, to remove the cases after notice and before action. He had no intention to remove them, and further time would not, so far as I can see, have caused any change in his position.

On all grounds it seems to me the defendant fails, and his motion must be dismissed, with costs.

GALT, J., concurred.

CAMERON, C. J.—I concur in the conclusion at which my learned brothers have arrived, on the ground that, in my opinion, the evidence fails to make out the defence set out in the defendant's statement of defence, and there is no ground on the facts for disturbing the finding of the learned Judge at the trial.

In the second paragraph of the statement of defence the defendant alleges "that it was distinctly understood and agreed by and between the plaintiff and defendant, that if the said defendant accepted the said lease from the plaintiff the rough shelving and tables and counters used by the plaintiff in his business should be removed from the store, and the store should be fitted up on both sides, including the portion reserved to the plaintiff, with the handsome and ornamental show cases of the defendant, so as to give the said store a uniform and attractive appearance; and in

pursuance of the said agreement the plaintiff, after the execution of the said lease, took down all his said rough shelving from the said store and removed the same, and also his tables and counters; and the defendant, with the consent and approval of the plaintiff, placed in the said store sufficient of the defendant's said handsome and ornamental show cases to fit up the said store and give it a uniform and attractive appearance; which are the causes of action and grievances complained of."

He also alleges in the third paragraph of his statement of defence "that the said agreement was not in writing, or intended to be in writing, or inserted in the lease, but was collateral thereto; and he alleges that he would not have become a party to the lease or accepted the same, or entered into possession of the portion of the store demised to him, but for the said collateral agreement to remove the plaintiff's said rough shelving and tables and counters from the said store, and to refit the said store and premises with the defendant's said handsome and ornamental show cases."

The plaintiff, in his evidence, denies that there was any such agreement.

The defendant in his evidence swore: After plaintiff signed the lease Mr. Crier produced this paper (sketch of the store) and they walked round the store and pointed where each case was to stand. This was after the lease was signed, and the plaintiff agreed to it—was perfectly satisfied. Mr. Crier had this plan in his hand and went round, and plaintiff and Mr. Crier both pointed out where each case was to stand. There had been a talk with regard to the plan and how the cases were to be placed—it was understood. The plan was made before he had anything to do with the lease. The arrangement was, the cases were to occupy the whole of the store, to make it a uniform store all through, as shewn upon the plan. There was nothing but rough shelving before, and the plaintiff took that down and put the cases up. * * It was understood how the stuff was to sit, and how each case was to stand,

and how the regulator was to stand, and everything. They were to stand just as provided in the sketch. They went round the store and were talking how each case was to stand. The lease had then been signed. The plaintiff said that was the understanding, the cases were to be placed in that way. He was explaining it to Mr. Crier; that is the way it was done. We thought it not necessary to put that in the lease, we understood it ourselves. Nothing was said about it between plaintiff and me when Mr. Crier was present; the lease had been made out and signed before. It was signed on that occasion. There was something said between Mr. Crier and the plaintiff about putting it in the lease. They talked in this way, that all that was necessary was in the lease. Mr. Crier read the lease, and plaintiff approved of it and said it was all right.

J. F. Crier, a witness called by defendant, said: "The place was to be fitted up in a uniform style. I spoke to the defendant at the time and asked him whose cases are going here, and he said, they are my cases. I am lending McKenzie some of my cases. They were marked there, and I pointed it out on the plan. They were to sit opposite to each other and they would have a uniform appearance. I asked whose cases were going here on McKenzie's side, and McGlaughlin said he was going to lend him his cases. * * I know it was distinctly understood that the cases were to be placed as designated on that plan, and the store was to present a uniform appearance. I thoroughly understood from what was said that that was to be thoroughly carried out."

Peter Tinsley, another witness called by the defendant, who assisted in putting up the cases, said: Both plaintiff and defendant gave instructions where the cases were to be placed. After the cases were placed on the east side, plaintiff commenced putting small goods in them. He said he was glad the cases were up, that that would make his goods show to good advantage. He said McGlaughlin was allowing him the use of the cases for the term of the lease. The cases were put on his side to make the place look uniform for *his use*.

It seems to me impossible to find on this evidence that there was an agreement, the consideration for which was the taking of the lease by defendant, that he should have a right to continue to have the show cases on the plaintiff's side of the store to make the store look uniform for the defendant's benefit. The plaintiff and defendant do not agree as to what was the actual agreement between them.

Crier's evidence goes to shew that the cases were lent to the plaintiff, and that they were so lent to make the place look uniform, as he understood. It cannot be said that his view of it strengthens the defendant's account of the transaction, and Tinsley's evidence goes to shew it was for the plaintiff's benefit, as he says the plaintiff told him the cases were put on his side to make the place look uniform for his use.

If the plaintiff had been suing in an action of trespass merely, I should say the evidence preponderated to shew that the show cases were put where they were for the plaintiff, by his assistance and for his benefit, and that he could not recover damages against the defendant. It was his place to take down the show cases and deliver them to the defendant, and if the defendant had not claimed the right to continue to keep the show cases in the part of the store reserved to the plaintiff, or rather excepted from the lease, I should have thought he was entitled to have the action dismissed. But as he has asserted a right to the occupation of the reserved part of the store by keeping his show cases there, the plaintiff had a right to come to the Court to be relieved from this invasion of his dominion over his own property; and the judgment of the learned Judge at the trial cannot properly, on the material before the Court, be disturbed.

Apart from the question of fact, I concur in the opinion expressed by my learned brother Rose that upon the law the defendant also fails.

Motion dismissed.

[COMMON PLEAS DIVISION.]

FLETCHER V. NOBLE.

Promissory note—Consideration—Misrepresentation.

To an action on four promissory notes made by the defendant and one H., payable to the plaintiff, the defendant set up that the notes were given for the purchase of the plaintiff's interest in certain homestead lands in the State of Michigan, H. being the purchaser and defendant surety: that under the laws of Michigan only persons of 21 years of age could homestead lands; and that the plaintiff was under that age. There was no representation that plaintiff was of age, and H. obtained from plaintiff a surrender of his interest in the land, whereby he was enabled to have himself located in his stead, which he otherwise might have had difficulty in doing, and he got the same rights which he would have got if the plaintiff had been of full age.

Held, that it could not be said that there was no consideration for the notes, nor any misrepresentation; and the plaintiff was therefore held entitled to recover.

THIS was an action brought to recover the amount of three promissory notes, made by the defendant and one W. B. Hodge, bearing date July 31st, 1878, each for the sum of \$100, and payable respectively at one year and eight months, two years and eight months, and three years and eight months, with interest at seven per cent., to the plaintiff or order.

The defence set up by the defendant was that the said Hodge, sometime in the month of July, 1878, entered into negotiations with the plaintiff to purchase his interest in certain land in the State of Michigan, one of the United States of America, and the plaintiff then represented that he had made a homestead entry upon the said land, pursuant to the laws in force in the said State of Michigan, sometime in the year 1876, being then of the age of twenty-one years: that he had ever since the said entry resided on and been in the actual occupation of the said land, and had made valuable improvements thereon, and therefore his interest in the said land was one which the government of the State of Michigan would recognize as nearly equivalent to an estate in fee simple, and upon the expiration of the time limited by the laws afore-

said, the said government would grant a patent vesting the lands in the plaintiff for an estate in fee simple: that the said Hodge, relying upon the said representation and believing it to be true, agreed to purchase the plaintiff's interest and improvements for the sum of \$500—payable, \$150 in cash, \$50 in six months, and for the balance the said notes were given, the defendant signing as security for the said Hodge: that the said Hodge subsequently discovered, as the fact was, that, at the time of the said pretended entry the plaintiff was not of the age of twenty-one years, but of the age of nineteen years; and the plaintiff had made no improvements on the said land, and had not been in actual possession of the said land, as required by the said laws; and that the plaintiff, therefore, had not any estate, right, title, or interest whatever such as would be recognized by the government of the said State.

The case was tried before Armour, J., without a jury, at Orangeville, at the Fall Assizes of 1884.

From the evidence of the said Hodge, who was called as a witness for the defence, it appeared that he had been told that the plaintiff had land, and would let his claim go cheaply; and he went to see him, and made a bargain with him: that there were no improvements except a little shanty, and no one had been living in it, no clearing except two little heaps of brush—the shanty was worth about \$10: that the plaintiff said he had his claim by homesteading the land, that is, had made application to the government for the land, had taken his papers out, and would sell his claim for \$500—witness understood that to get a homestead a man must be twenty-one, or the head of a family: that some time after he found out that the plaintiff was not of age, and refused to pay.

It appeared, on cross-examination, that the plaintiff and defendant had been living near together in Canada before going to the States. Witness said he went to the plaintiff, the plaintiff did not go to him. He often passed the plaintiff's door. Witness understood the plaintiff had a claim to the land, and wanted to get rid of him, so as to make

an entry upon it. When the bargain was agreed on, the plaintiff and witness went to a lawyer to get the writings drawn for the plaintiff to relinquish his claim to the government; and then witness made an entry and got from the government the land. The plaintiff gave evidence of a like import.

By the law of Michigan, only persons twenty-one years of age and over are entitled to locate homesteads.

The learned Judge entered judgment for the plaintiff.

In Michaelmas Sittings, *Osler, Q. C.*, moved, on notice to set aside the judgment entered for for the plaintiff, and to enter judgment for the defendant.

During the same sittings, December, 6, 1884, *Osler, Q. C.*, supported the motion. There was clear evidence of fraud and misrepresentation by the plaintiff in alleging that he had a homestead right, whereas he had none, for by the law of Michigan only persons of the age of twenty-one years, are entitled to locate homesteads, and the plaintiff was under the age of twenty-one years. Hodge was induced to purchase by reason of such misrepresentation, and this is a good defence to the action. There was also a partial failure of consideration, and since the O. J. Act this can be pleaded as a defence to a note. He referred to *Rawle on Covenants*, 4th ed., 584-5; *Georgian Bay Lumber Co. v. Thompson*, 35 U. C. R. 64; *Kellogg v. Hyatt*, 1 U. C. R. 445; *O'Brien v. Ficht*, 18 U. C. R. 241; *Palmer v. Johnson*, 13 Q. B. D. 351; *Foley v. Canada Permanent Loan and Savings Co.*, 4 O. R. 38.

G. T. Blackstock, contra. There was clearly no misrepresentation here. The plaintiff never represented that he was of age, and the fact of his being under age was known to Hodge. Hodge got what he wanted; he got, namely, an assignment of the plaintiff's right, and the State of Michigan have not questioned Hodge's right as assignee. Hodge got all he could have got if the plaintiff had been of full age. Partial failure of consideration cannot be set up as a defence. If a defence at all it can only be set

up by counter claim. *O'Brien v Ficht*, 18 U. C. R. 241, is quite distinguishable, as there the defendant had neither had possession nor received any benefit from the purchase. He also referred to the *Star Kidney Pad Co. v. Greenwood*, 5 O. R. 28; *Lundy v. Kerr*, 7 C. P. 371; *Blanchfield v. Birdsall*, 7. U. C. R. 141; *Lamert v. Heath*, 15 M. & W. 486; *Parsons on Contracts*, 7th ed., 462; *Hull Manufacturing Co. v. American Railway Supply Co.*, 48 Mich. 331.

December 20, 1884. CAMERON, C. J.—The only objection to the plaintiff's right to recover was based on the alleged fact that the plaintiff, when he entered his homestead claim, was a minor, and, by the law of Michigan a minor was not entitled to be located for land, and the plaintiff's location was therefore void. Assuming this to be so, the fact was as much within the knowledge of the purchaser Hodge and the defendant as the plaintiff; and the surrender of the plaintiff's right, whether it proved to be a legal claim or not, was a sufficient consideration for the giving of the notes, and Hodge got all that he could have got by that surrender had the plaintiff been of full age. There is not a tittle of evidence to shew that the plaintiff made any representation as to his age whatever, if that, under the circumstances, would have made any difference.

If the case for the defendant had not been urged with much persistency by his counsel, I should have thought it was entirely too clear to admit of argument that the fact of the plaintiff's minority in no manner affected his right to recover, even if it had been conclusively established.

The motion must be dismissed, with costs.

ROSE, J.—The learned Chief Justice and my brother Galt were prepared to dismiss this motion upon the close of the argument. I desired, however, that judgment might be reserved, to enable me to read the evidence, which I had been unable to do prior to the argument.

I have considered the arguments addressed to us, and examined the cases, to discover, if possible, the ground upon which the defence rested. Had I been able to discover that the defendant had been misled to his hurt, I could easily arrive at the conclusion that some relief should be given. I am unable to do so. It may be the plaintiff was endeavouring to impose upon the Government of the United States; but he had some apparent interest or claim, which it might have given the defendant much trouble to have gotten rid of. If, after entering into the contract and giving the notes, the claim of Hodge had been ignored by the government, so that there had been a failure of consideration, or if Hodge had been put to trouble and expense consequent upon the nonage of the plaintiff, or in any other way had suffered damage, he might have sustained a defence or counter-claim as to the whole or a part.

Of the cases cited by defendant's counsel, *O'Brien v. Ficht*, 18 U. C. R. 241, most resembles this; but the statement there that "the defendant had neither had possession, nor received any benefit whatever from the purchase of that lot," *i. e.* one of two lots forming the consideration for the note sued on, shews that it affords no support for the defendant's contention.

I agree the motion must be dismissed.

GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

PORTEOUS ET AL. V. MUIR ET AL.

Promissory note—Extension of time for payment—Parol evidence of.

Held, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand, was not admissible. *Per GALT, J.*—Even if the evidence was admissible, by the terms of the agreement, in this case, the time was to be suspended only on performance of certain conditions, which the defendant had failed to do, and therefore the plaintiff was entitled to enforce immediate payment.

THE plaintiffs brought their action on December 29th, 1883, to recover from the defendants a balance of \$455.31, with interest from December 21st, 1883, on a promissory note for \$1,000, made by the defendants, payable to John Muir & Son or order, on demand, dated March 22, 1883, and endorsed by John Muir & Son to the plaintiffs.

The defendants, by the fourth paragraph of their statement of defence (the only part of the defence necessary to be considered), in substance alleged that in the month of September, 1882, the defendant John Muir and one Ishmael Crowther were in partnership in a woollen mill, situated on land in the village of Paisley, upon which Robert Porteous, one of the plaintiffs, held a mortgage for the sum of \$4,000: that John Muir and Ishmael Crowther were about to dissolve their said partnership, and give up their business: that the said Robert Porteous being, as such mortgagee, greatly interested in the said business being continued, promised and agreed with the defendant John Muir (of which agreement the co-plaintiff Edward Saunders had full knowledge when the plaintiffs became the holders of the said note), in consideration of the said John Muir purchasing the interest of the said Crowther in the said partnership, and carrying on the said business in partnership with the defendant Robert Muir, and of the said John Muir giving his note and a warehouse receipt on the goods in said premises to the said Robert Porteous to secure the repayment of the sum of \$1,550, to advance and lend to

the said John Muir the said sum of \$1,550, to be repaid within two years from the time of such advance, on such days and times and in such manner as the said John Muir might be able to repay the same, the interest on the same being payable every month : that the said Robert Porteous advanced and lent the said \$1,550, as aforesaid, and the said John Muir, relying on the said agreement, purchased the interest of the said Crowther, and the defendants entered into partnership, carried on the said business as agreed on, gave the said warehouse receipt and note, and repaid to the said Robert Porteous \$550 of said \$1,550, and paid the interest thereon each month, and reduced the said claim to \$1,000, for which amount the defendants gave the note sued on, which note was to be paid on the same terms. And the defendants faithfully carried out their part of the agreement, but the plaintiffs, in violation of the said agreement, brought this action, although the time for payment of the said note has not yet arrived.

The action was tried before Cameron, C. J., and a jury, at Toronto, on June 19th, 1884.

The plaintiffs proved the making by the defendants of the note, and the endorsement of the same by John Muir & Son (the said firm being composed of the defendants) to the plaintiffs, and rested their case.

The defendants then gave evidence of the alleged agreement in the fourth paragraph of their statement of defence, the plaintiffs' counsel objecting to the reception of such evidence—the alleged agreement not being in writing—as violating the rule against altering or varying a written contract by parol, and altering the legal effect or operation of the note.

The evidence was admitted, and the jury found in favour of the defendants.

In Michaelmas Sittings November 20, 1884, *Moss, Q. C.*, obtained an order *nisi*, calling upon the defendants to shew cause why the verdict of the jury should not be set aside, and judgment entered for the plaintiffs, substantially on the

ground taken at the trial, that there was no evidence that could be properly left to the jury to vary or alter the legal effect of the promissory note sued on.

During the same sittings, December 5, 1884, *Moss*, Q. C., supported the order. The note here is payable on demand, and parol evidence is not admissible to shew that it was to be payable otherwise than as it states, namely, that the note was not to be payable for two years. To allow this is to admit parol evidence to contradict or vary the note, and this is clearly inadmissible: *Moseley v. Hanford*, 10 B. & C. 729; *Abrey v. Crux*, L. R. 5 C. P. 37; *Trustee, &c., of Hanson v. Stetson*, 3 Pick. 506; *Edwards* on Promissory Notes, 3rd ed., secs. 165-6; *Inglis v. Buttery*, 3 App. Cas. 552. [CAMERON, C. J.—The case of *Stott v. Fairlamb*, 48 L. T. N. S. 574, seems to shew that the evidence is only admissible where the note is merely an incident in the contract, for then the whole contract may be shewn. And the only ground on which the evidence could be admitted is that time for payment is merely such incident.] All that case decides is that you can shew want of consideration. In all the cases in which parol evidence has been admitted there was a want of consideration, or illegality of consideration, or such like defence; but the cases clearly decide that you cannot shew that the time was extended, for this is to vary the note. But even if the evidence is admissible, all it shews is, that the time was to be suspended on the performance of certain conditions by the defendant, and default was made in the performance of the conditions. In this view therefore the action is maintainable: *Hemp v. Garland*, 4 Q. B. 519.

O'Connor (of Walkerton) contra. This was merely an incident of a larger bargain, and parol evidence was clearly admissible to shew what the bargain was, and that one of the incidents was that the note, which was given as part of the bargain, was not to be payable for two years: *Wallace v. Littell*, 11 C. B. N. S. 369; *Shepard v. Hall*, 1 Conn. 494. The parol evidence was not brought out

by the defendant, but by the plaintiff on cross-examination; and having been received without objection, cannot be now objected to : *Crandall v. Nott*, 30 C. P. 63. There was no default made by the defendant which entitled the plaintiff to sue.

Moss, Q. C., in reply. The plaintiff certainly objected to the admission of the evidence.

December 20, 1884. *CAMERON*, C. J.—I am of opinion there was no legal evidence to affect the plaintiffs' right to recover on the note. There is no doubt that parol evidence is not admissible to alter or vary the express terms of a promissory note; and the only ground on which the defendant could argue that this rule should not be entitled to prevail would be, that the note was only an incident in, or part of, a larger agreement: that the larger agreement existing, the parties to it would be entitled to shew what it was; and if, by the agreement so shewn, there was a term giving a different effect to the note from the legal effect of the note itself, the true agreement should prevail rather than the part.

I am unable, however, to distinguish the present case in principle from those cited by Mr. Moss in his argument, and some others which I have seen and shall refer to.

In *Woodbridge v. Spooner*, 3 B. & Al. 233, decided in 1819, it was clearly laid down that it was not permissible to shew that by the agreement of the parties a note payable on demand was not to be enforced till after the death of the maker.

Abbott, C. J., said, at p. 235: "Now it is contrary to the rules of law to admit extrinsic evidence to shew, that the intention of a party executing a written instrument is different from that apparent on the face of the instrument itself."

Bayley, J., said at p. 236: "It is a general and useful rule, that no parol evidence is admissible to contradict that of which there is written evidence; and I think, therefore, that this evidence was not admissible."

Holroyd, J., at p. 236, said : " This evidence was adduced, not to shew a want of consideration, or that the consideration for the note was illegal, or that it was not delivered to the party to be made use of for his own benefit. The utmost extent to which it could go, was an attempt to prove that the note was not payable as on the face of it it imported to be. This, therefore, was to contradict the note itself, which, by the rules of law, a party is prohibited from doing."

Best, J., at p. 236, said : " The parties in this case are bound by a written contract, and it is contrary to the first rules of law to admit parol evidence to vary or contradict it, and the only exception to these rules is where a contract is illegal."

I make these extracts from the opinions of these Judges, as the authority of the case is still recognized.

In *Abrey v. Crux*, L. R. 5 C. P. 37, it was pleaded to an action on a bill of exchange, brought by the payee against the drawer, that the defendant drew the bill and delivered it to the plaintiff for the accommodation of the acceptor, and as surety for him : that at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed between the plaintiff, the defendant, and the acceptor that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill ; and that, in case the bill should not be duly paid, the plaintiff should sell the securities, and apply the proceeds in liquidation of the bill ; and that, until the plaintiff should have so sold the securities, the defendant should not be liable to be sued on the said bill. The plea averred the deposit of the securities, and that plaintiff still held them. On this plea issue was taken. It was objected at the trial that the alleged agreement, not being in writing, did not sustain the plea, and that oral evidence of it was inadmissible. The learned Judge rejected the oral evidence, and a verdict was entered for the plaintiff for the amount of the bill. This verdict was moved against and sustained by the full Court consisting

of Bovill, C. J., Willes, Keating, and Brett, JJ., after a careful review of the authorities.

Mr. Justice Willes thought that the justice of the case was with the defendant, and said : " I do not see why we should not make a precedent, to meet the circumstances and the merits of the particular case. The law as to bills of exchange constitutes an exception to that relating to ordinary contracts, with respect to the discharge by parol of the obligation created thereby ; as is exemplified by the case of *Foster v. Dawber*, 6 Ex. 839, I do not see why we should not in a novel case to which no distinct law is applicable, rather follow the justice of the case than strive to bring the case within a principle which will defeat justice. For these reasons I entertain great doubt, though I do not feel so strongly on the subject as absolutely to dissent from the judgment of the rest of the Court."

In the present case I am of opinion that the weight of evidence strongly preponderates in favour of the merits being with the plaintiffs and not with the defendants, and that there ought to be a new trial if the case was one in which there was anything for the jury to determine. Still I regret to find that the law would not permit the Court to uphold the verdict of the jury had the merits been altogether with the defendants. I am quite unable to place my finger upon a reasonable point of distinction between *Abrey v. Crux* and the present case. A valid consideration for the bill in that and for the note in this existed ; and it was as competent for the parties to agree in that that the defendant should not be sued till the securities had been realized as for them in this to agree if the interest was punctually paid the principal should not be enforced for two years. Both are reasonable arrangements and might be well agreed to in the interest of all parties, and there must always be a reluctance to find the law opposed to the carrying into effect the intention of parties exhibited by their agreement when that intention is not in furtherance of some dishonest or immoral object, but designed to accomplish some lawful end which the parties supposed to be in their respective

interests ; and feeling this reluctance I have endeavoured to ascertain whether the case could not be brought within some of the exceptions that have been engrafted on the above well established rule of law. But I do not find any case like the present, where the agreement was allowed to interfere with the operation of the writing according to its legal effect.

In *Fitzgerald v. Grand Trunk R. W. Co.*, 27 C. P. 528, affirmed on successive appeals to the Court of Appeal and Supreme Court of Canada, the term that the goods were to be carried *in covered cars* was allowed to be established by parol and added to the contract, as that in no way varied or contradicted what the writing contained. Where there is a verbal contract for the making of which the entering into the written contract is the consideration, the contract may be shewn though it has relation to the subject of the written contract: *Morgan v. Griffith*, L. R. 6 Ex. 70; *Mann v. Nunn*, 43 L. J. N. S. C. P. 241.

To the like effect is *Angell v. Duke*, L. R. 10 Q. B. 174.

The cases relating to warranties, are also exceptions. *Gordon v. Waterous*, 36 U. C. R. 321; *Ellis v. Abell*, in the current volume of the Appeal Reports, 10 A. R. 226, are of this character.

The class of authorities most favorable to the defendant's contention is that relating to the suspension of the time for the contract to come into force. To this class belongs the case of *Wallis v. Littell*, 11 C. B. N. S. 369, cited by Mr. O'Connor. But in such cases there is a completed contract, nothing to be added to or taken from it, but it is to have no beginning whatever except upon the happening of a stipulated contingency, and it is to such a suspension of the contract that Brett, J., alludes in his judgment in *Abrey v. Crux*, at p. 45, wherein he concurs with the other Judges in holding the parol evidence inadmissible, " because it did not impeach the consideration for the bill, or shew that it had failed, or set up an agreement to suspend the commencement of the defendant's liability."

To suspend the "operation" of the agreement would perhaps more accurately define what I take to have been the learned Judge's meaning, than the commencement of the defendants' liability.

In *Wallie v. Littell*, the parties entered into a written agreement for the assignment of a farm with immediate possession, but before entering into the written agreement, or at the time thereof, there was an oral agreement that the written agreement was to be void if Lord Sydney, the landlord, did not consent to the assignment.

In the present case it could not be contended any more than in *Abrey v. Crux*, that the note was signed upon an agreement that it was not to operate as a note until some event happened. It was intended to be a note to belong to the plaintiffs from the moment it was delivered to the plaintiffs, but it was contended it was a note payment of which was not to be demanded for two years unless in the meantime the defendants made default in payment of interest on the money advanced monthly, according to what the defendants alleged the true agreement was.

The latest case that I have seen bearing directly upon the question to be decided in this case is that of *Stott v. Fairlamb*, reported in 48 L. T. N. S. 574. The defendant agreed with her partner that he should retire from the business as of a particular date: that the defendant should pay him £2,000 within three years, with interest: that he should accept £2,000 in full satisfaction of all his share in the partnership. Subsequently in the month of September the defendant gave his note for £2,000, payable on demand, under the following circumstances: The payee of the note called on the defendant and told her that he wanted something to shew his own people: that they were not satisfied with the agreement, and wanted a promissory note. Upon the defendant saying, "what if anything should happen to him," he promised to send her a letter to the effect that the note should not be put in force until the three years mentioned in the agreement had expired, and added, "I can trust you, and can't you trust me," whereupon the defen-

dant gave the note. The jury found the statement of the defence setting up this arrangement proved. Upon the authority of *Abrey v. Crux*, and *Woodbridge v. Spooner*, already cited, judgment was given for the plaintiff, Denman, J., saying, at p. 576 : "So far, then, as the case depends on the establishment of a parol agreement, contemporaneous with the note, to the effect that the note, though on the face of it payable on demand, should not be enforced for three years, I think the defendant's case fails, inasmuch as although the jury have found a parol contract proved, such contract is immaterial and inoperative to contradict the terms of the note."

There is no ground for contending in this case there was any writing which shewed the full agreement between the parties. All the writings varied. The mortgage money was, by the terms of the mortgage, payable in three months; the warehouse receipt was to be in force for six months, and the note is payable on demand. So there exists no room for the question presented in *Stott v. Fairlamb*, which of the two agreements in writing was entitled to prevail. Judgment was given on the ground that there was no consideration to support the note at the time it was made. This judgment was subsequently reversed, and judgment directed to be entered for the plaintiff by the Court of Appeal, 49 L. T. N. S. 525.

The verdict for the defendants must therefore be set aside, and judgment entered for the plaintiffs for the balance claimed by them on the note, that is to say, \$485.31, with interest from the 21st December, 1883.

GALT. J.—I fully concur in the judgment pronounced by the Chief Justice, but in addition to the reasons therein stated I am of opinion the plaintiffs are entitled to recover on the terms of the agreement itself.

By the fourth paragraph of the statement of defence, the defendants state that "in consideration of the said John Muir purchasing the interest of the said Crowther in said partnership with his co-defendant Robert Muir, and of the said John

Muir giving his note and a warehouse receipt on the goods in said premises to the said Robert Porteous to secure the repayment of the sum of \$1,550 hereinafter mentioned, that the said Robert Porteous would advance and lend to the said John Muir \$1,550, to be repaid within two years from the time of said advance on such days and times, and in such manner as the said John Muir might be able to repay same, the interest on same being payable every month; and the said Robert Porteous advanced and lent the said \$1,550, as aforesaid. And the defendants say that relying on said agreement the said John Muir purchased the interest of said Crowther: that they entered into partnership: that they carried on such business as agreed on, gave such warehouse receipt and note as above, and repaid to the said Robert Porteous \$550 of said \$1,550, and paid the interest thereon each month, as aforesaid, and reduced the said claim to the sum of \$1,000, for which amount the defendants gave the note now sued on, which said note was to be paid on the aforesaid terms; and faithfully carried out their part of said agreement; but the plaintiffs in violation of said agreement have brought this action although the time for payment of said note has not yet arrived."

From the foregoing it is plain that payment of the note was not to be demanded until a certain time, provided the defendants carried out their agreement, one of the most important items of which was they were to give a warehouse receipt on the goods in the premises. They aver fulfilment of this condition, but it is plain from the evidence of the defendant Muir that whether they gave a warehouse receipt or not, they disposed of their goods without consent of the plaintiffs, so much so that the plaintiffs were obliged to institute a replevin suit in order to obtain possession of some of the goods that had been removed. This in itself fully justifies a demand for immediate payment of the note.

ROSE, J.—The analysis of the decisions by the learned Chief Justice leaves no room to doubt what the result must be. While in this case one may not regret such result, it would have seemed to my mind much more satisfactory were we enabled to hold that parties to an agreement founded on a consideration which they deemed sufficient should be permitted to give parol evidence of such agreement, and should be bound to carry the same into effect, even though it involved the result that the right of action on a written agreement was suspended beyond the time stated on its face. This does not seem more questionable than to be permitted to shew that it did not take effect on its date, as in the case of an escrow. A written agreement, nothing appearing on its face to the contrary, takes effect from its date. You may shew it did not so take effect but remained an escrow; and yet you may not shew that it is not payable on the day mentioned on its face for payment, for it is said that would be to contradict its terms.

Here we have a note payable on demand, a mortgage payable in three months, and warehouse receipts to be in force for six months, and yet even as between the original parties to the agreement we are not permitted to enquire into and ascertain the fact, if such fact would shew that payment of the note was, according to the parol agreement, not to be demanded prior to the expiry of two years.

While, as I have said, in this case the result may not be unsatisfactory, the rule would be just as rigid and quite as binding were the rankest injustice to follow from its application.

In the light of *Foakes v. Beer*, 9 App. Cas. 664, it is clear the authority of unquestioned decisions must prevail, even though it may seem quite opposed to the present notions of right and equity.

The high Court of Parliament would seem the place to obtain relief, even against judicial errors. This may be best—it is not open now to question.

I agree that the judgment must be for the plaintiff.

Motion allowed.

[COMMON PLEAS DIVISION.]

WARD V. HUGHES.

Assignment of chose in action—Right to sue on—New trial.

Held.—Rose, J., expressing no opinion on the point—that where an assignment of a mortgage on land was absolute in form, though as a matter of fact the assignor retained a right to part of the money, an action on the covenant in the mortgage must be brought in the name of the assignee. A new trial was granted in this case, there being circumstances requiring further consideration, with leave to so amend the pleadings and add such parties as might be necessary.

THIS was an action brought by the plaintiff against the defendant on a covenant contained in an indenture of mortgage, dated 2nd February, 1881, whereby the defendant covenanted to pay the plaintiff the sum of \$400 at the expiration of five years from the 17th day of May, 1880, with interest thereon till paid at the rate of eight per cent. per annum, on the second days of February and August, in each year; the first payment of interest to be made on the 1st day of August, 1881; and it was provided by the indenture containing the covenant that in default of payment of interest the principal should forthwith become payable.

The plaintiff, in his statement of claim, averred that default had been made in the payment of interest, and claimed that the principal had become payable.

The defendant, besides denying the making by him of the covenant, which was fully proved, set up that if the said mortgage was executed by him it was so executed in pursuance of an agreement between the parties; and alleged that the agreement had not been performed, and that there was a total failure of consideration for the said mortgage.

The defendant also alleged that the plaintiff had sold and assigned the said mortgage, and was not the owner thereof.

The defendant further set up a counter-claim, which is not material here.

The plaintiff replied, taking issue on the defendant's statement of defence, and replied to the defendant's counter-claim.

The plaintiff also demurred to the statement of defence, except so much thereof as denied the making of the mortgage and covenant, and except so much as related to the defendant's counter-claim, on the ground that the same is no defence to the statement of claim, inasmuch as a covenant does not require any consideration to support it; and upon other grounds sufficient in law to sustain the demurrer.

The case was tried before Galt, J., and a jury, on the 14th day of June, 1884.

The only witness called was the plaintiff, who proved the execution of the mortgage, and that by an assignment absolute in its terms, he, on the 25th day of October, 1881, in consideration of \$300 to him paid by Annias Turner, assigned to the said Turner the said mortgage, and the sum of \$400 and interest; and by assignment dated the 1st January, 1884, the said Turner assigned the said mortgage and sum of \$400 and interest, in consideration of one dollar, to Anna Maria Ward, wife of the plaintiff.

The plaintiff was the witness to the execution of this last assignment. He swore it was not his intention to assign the whole of it: that he reserved \$100 of it. He further said that the suit was brought with the consent of both Mr. Turner and his, plaintiff's, wife. The consent was given verbally by Turner at the time the suit was brought.

After the case had been heard, the jury was dispensed with, and the learned Judge gave the following judgment "I dismiss the action, with costs, as I consider there was no consideration given for the mortgage, as the plaintiff did not convey the Brockton property to the defendant or his assignee.

As respects the counter-claim, I allow that to be withdrawn in this action without prejudice to the rights of the defendant.

During Michaelmas sittings, *George Bell* moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff for the principal sum of \$400 and interest at 8 per cent. per annum from 1st day of February, 1881; or for a new trial, on the ground that the judgment directed to be entered is wrong, inasmuch as the same is contrary to law and evidence.

During the same sittings, November 22, 1884, *George Bell* supported the motion. The evidence shews that though the assignment is absolute in form, the assignor reserved an interest, and he is therefore entitled to maintain an action. The statute only applies when the whole beneficial interest has passed to the assignee. It is not necessary that the fact of the assignor having reserved such interest should appear on the face of the instrument, but it may be shewn by extrinsic evidence: *Dawson v. Graham*, 41 U. C. R. 422; *Wood v. McAlpine*, 1 A. R. 234; *Hostrawser v. Robinson*, 23 C. P. 530. Then as to the other point. Failure of consideration is no defence to an action of covenant, as here an action on a mortgage under seal. The agreement also was partially performed, and the parties cannot be put in *statu quo*, and therefore there can be no rescission. The defendant's remedy, if any, must be by cross-action: *Leake on Contracts*, 631, 653. [ROSE, J., referred to *Morrison v. Earle*, 5 O. R. 434.]

The defendant in person, contra. The plaintiff cannot maintain the action. The mortgage having been assigned by an instrument absolute in form, the action must be maintained in the name of the assignee, and parol evidence is not admissible to vary the written instrument. There was also such a failure of consideration as constitutes a good answer to the plaintiff's claim.

December 20, 1884. CAMERON, C. J.—The case as presented on the argument raises two questions for the decision of the Court. 1st. Was the action properly brought in the name of the plaintiff, after his having assigned the

mortgage by an assignment absolute in form, though he intended to reserve an interest in himself? And secondly, was there such a failure of consideration, under the circumstances appearing in evidence, as disentitled the plaintiff to maintain his action on the covenant.

The first question is not free from difficulty.

The 7th section of R. S. O. ch. 116, is express in its terms, that the assignee of a chose in action shall sue in his own name thereon if the assignee comes within the definition of assignee given in section 6, which is, "any person entitled by any first or subsequent assignment, or any derivative or other title, to a chose in action, and possessing at the time of action brought 'the' beneficial interest therein, and the right to receive and give an effectual discharge for the moneys, or the charge, lien, incumbrance, or other obligation thereby secured."

In the present case the assignment is absolute in terms, and the assignee, Turner, according to the plaintiff, had a beneficial interest in the mortgage debt to the extent of \$300, or three-fourths of the whole amount, at the time of the assignment to him, which right or interest Mrs. Ward, wife of the plaintiff, now holds.

There is also express authority given to the assignee by the terms of the deed of assignment to use the name of the plaintiff, the assignor, in enforcing the covenant. The assignee would have in law the right and power to give a complete discharge of the debt. He therefore answers the definition of assignee given in section 6 to the letter, unless the use of the definite article "the" instead of *a* is taken as indicating the intention of the Legislature to have been that only those receiving and taking the entire beneficial interest were to come within the description of those entitled to the benefit of the Act and compellable under it to sue in their own names.

The first case in the Courts of this Province decided under the Act, was that of *Wellington v. Chard*, 22 C. P. 518, where the question was raised on demurrer to a plea setting up an assignment of the debt to a third party as a

bar to the action. The plea was held good. The case was decided in 1872.

The following year the case of *Hostrawser v. Robinson*, 23 C. P. 350, came before the same Court; and it was held under the terms of the assignment, which was only intended to operate as a mortgage or pledge of part of the debt, the assignee had not a right to sue in his own name. My brother Galt in delivering the judgment of the Court, at page 354 said: "The case appears to me not to come within the operation of the statute. It is not like the case of *Wellington v. Chard*, 22 C. P. 518, which was an absolute transfer of a distinct claim under an award, but is simply a pledge of a security, with a right to bring an action in the name of the assignor."

The question again arose in *Dawson v. Graham*, 41 U. C. R. 532, and the decision in *Hostrawser v. Robinson*, was followed under like circumstances. But the Chief Justice in the case said, at page 539: "If the assignment be one within the operation of 35 Vic. ch. 12, sec. 1, O., that statute directs that the assignee shall sue thereon in his own name;" and he italicised the word "shall" to denote its imperative character. The plaintiff had replied to the fifth plea, setting up the assignment, that under and by virtue of the terms of the assignment the assignee was authorized to sue and take all steps in the name of the plaintiff for the purpose of collecting, receiving and demanding from the defendant the amount payable by, or recoverable from him for or on account of the said claim or chose in action; and in reference to this the learned Chief Justice said, "The replication to the fifth plea in this case, appears to us to bring the case within the principle of *Hostrawser v. Robinson*, and there was no contention to the contrary at the trial. Indeed, it is said that the defendant did not take issue on that replication. The plaintiff swore to having executed the assignment to Mr. Strathy," (the assignee) "as security to him. It is not now suggested that the fact is otherwise. We ought not, we think, to assist the defendant, who made no contest on the point at the

trial. Then assuming the facts in the replication alleged, and which are not denied, to be true, the question, if there were a demurrer to the replication, which there is not, would be whether it should appear on the face of the assignment that the assignment was made only as a pledge for a loan, in order to except the case from the operation of the statute. We do not see that this should make any difference. Where it appears that the assignor has divested himself of all beneficial interest, and the thing assigned is a debt or chose in action, the action must be brought in the name of the assignee, who is the real as well as beneficial owner. But where the assignor still retains a beneficial interest he, according to the *ratio decidendi* of *Hostrawser v. Robinson*, as we understand it, is not prevented from suing at law, as before the statute, in his own name. We follow *Hostrawser v. Robinson*, being the decision of a co-ordinate Court, without any expression of our own on the point there decided. But if that decision or our application of it were successfully impeached, as the only result in this case would be the substitution as plaintiff of Mr. Strathy, who is the plaintiff's attorney, and willing to be so substituted, we shall not further dwell on the point."

The only other cases, as far as I am aware, in which the question has been considered are *Wood v. McAlpine*, 1 App. 234; and *Duff v. Canada Mutual Fire Ins. Co.*, 9 P. R. 292. In this latter case Proudfoot, J., held that an assignment absolute in form, but on a trust to pay particular debts named, entitled the assignee to sue in his own name. The case was transferred to the Common Pleas Division, and the decision reversed on another point, but not on this.

In *Wood v. McAlpine* the point decided was, that to enable an assignee to sue he must have the beneficial interest, and a person made assignee merely to enable him to sue was not within the statute.

In none of the cases has the point here presented been determined. The assignment is absolute in terms and the assignee is beneficially interested, and it seems to me that he

has not only the right to bring the action, but is the only person who has such right. It never was the intention of the Legislature that a cause of action for the same debt should exist in two different persons not suing as partners or joint creditors, nor could it have been intended that in a case like the present the assignee should not be entitled to the beneficial operation of the Act. If he is so entitled this action is not well brought in the present plaintiff's name.

In England there is not an Act similar to ours, and therefore there is no English authority that clearly covers the case. The nearest decision that I have seen is one under sub-sec. 6 of sec. 25 of the Imperial Judicature Act, 36 & 37 Vic. ch. 66; the difference between which and our Judicature Act will be found at pages 25 and 26 of *Mac-lennan's Judicature Act*, 2nd ed., by *Langton*. The provision in the Imperial Act only enables an assignee, under "an absolute assignment not purporting to be by way of charge only," to sue in his own name.

In 1881, Pollock, B., in *National Provincial Bank v. Harle*, L. R. 6 Q. B. D. 630, slightly touches upon one of the difficulties presented in this case, namely, the effect of the statute where the assignment is absolute, but the surrounding circumstances may shew it was to operate by way of charge only. His language, at p. 630, is: "One matter with reference to the language of the sub-section ought, perhaps, to be further mentioned, namely, what is the meaning of the words 'purporting to be by way of charge only'? Do they mean an assignment which expresses on the face of it that it is made 'by way of charge only,' or do they mean an assignment which, coupled with all the surrounding circumstances, shews that it is made by way of charge only? Cases may arise which will require a careful consideration of this question."

It was not necessary to decide the point, as the assignment under consideration sufficiently shewed upon its face that it was only by way of charge, and judgment passed for the defendant against the assignee.

If it was a matter of doubt whether the assignee could sue in his own name, under the Judicature Act, the language of which is not imperative, but merely declares that an absolute assignment, not purporting to be by way of charge only, shall be effectual in law to pass and transfer the legal right to the debt or chose in action, and all legal and other remedies for the same, it can hardly be said, under our very positive enactment that where the assignee takes the beneficial interest he shall sue thereon in his own name, that this action has been properly brought in the name of the assignor.

In his statement of defence the defendant has set up the assignment as a bar to the plaintiff's claim. The plaintiff has not replied anything to take the case out of the operation of the Act, and it may well be supposed that the defendant does not come to the trial on such an issue prepared to meet the plaintiff's alleged partial interest, and so without an amendment of the replication to the defendant's statement of defence on this ground the action was technically properly dismissed.

But upon the question of the failure of consideration, it does not appear to me that the evidence discloses a total failure of consideration, nor does it appear that the defendant would be prejudiced by the alleged failure of consideration. The exact shape of his transaction with Hiscocks with respect to the Brockton property is not made to appear, and from all that has been shewn it is impossible to say that Hiscocks may not have assumed the defendant's rights as against the plaintiff, and exonerated the defendant from all liability. There is much in the case that wears a suspicious aspect, and there should be a further investigation, with such amendment of the pleadings and the addition of such other parties as may be in the judgment of the parties necessary to a complete settlement of all their rights in connection with the transaction.

The new trial should, we think, be without costs.

GALT, J., concurred, with Cameron, C. J.

19—VOL. VIII O.R.

ROSE, J.—I agree that there should be a new trial.

It therefore becomes unnecessary to decide the question as to the right of an assignor of a chose in action who retains a beneficial interest therein to sue in his own name for its recovery, or to determine whether it is essential that the fact of the reservation should appear on the face of the assignment or whether it may be shewn by extrinsic evidence. I have no doubt the plaintiff will avail himself of the leave to amend, so these questions will not again arise in this action.

Had it become necessary to express an opinion I should have desired to consider them further.

I do not dissent, but merely wish to keep the questions open for further consideration should they again arise.

Motion allowed.

[COMMON PLEAS DIVISION.]

MOFFATT V. SCRATCH.

Tax sale—Lands granted by Crown by mistake—Surrender—Possession—Statute of Limitations—Equity as against Crown.

In 1808 an order in council was passed for a grant of land to W., the daughter of a U. E. Loyalist. In 1818 certain land was located thereunder, and a patent issued therefor. In 1819 W. petitioned the Governor-in-Council, stating that this was by mistake and without any authority from her; and in 1820 an order in council was passed allowing her to surrender the land and to locate other land in lieu thereof. In 1820, before the surrender, the surveyor-general furnished the treasurer with a list of lands in this district, specifying this lot as deeded to W. The land was thereupon assessed, and in 1831, having been returned by the treasurer to the sheriff as in arrear for the taxes for the years 1820-9, and liable for sale, it was in that year sold to S., and a tax-deed given in 1832. In 1839 S. conveyed to N., who in 1840 conveyed to G., through whom the plaintiff claimed. In 1839 N. petitioned the Governor-in-Council, stating that he was the assignee of the tax-purchaser: that he had discovered that the surveyor-general's return was in error, the land having been surrendered, but that under the circumstances the tax-sale was regular, and that it should be confirmed, and a patent issued to him. In 1840 an order in council was passed, stating that if N.'s tax-title was valid he did not require a patent, but if not, the Government had no power to make a free grant of the land. In 1868 the Crown granted the land to H., who conveyed to the defendant.

Held, that as under 59 Geo. III. ch. 7 and 6 Geo. IV. ch. 7, only lands granted by the Crown were to be liable to assessment and sale, and as, under the circumstances, the lands never passed out of the Crown and vested in W.—the formal surrender being taken rather as a precautionary than as a necessary act, and the mistake of the surveyor-general in not giving notice of the surrender could not make the land liable to be sold for taxes as against the Crown—the tax-sale was invalid, and nothing passed under it; and that the defendant, claiming under the subsequent patent, was entitled to the land.

Per Rose, J. If any title vested in W. the surrender was ineffectual as a conveyance to divest it; but that in such case the action of W. in applying for and obtaining another grant of land created an equity in the Crown, entitling it to the possession and disposal thereof, and, as against W., at all events, the possession was in the Crown immediately on the surrender.

Quere, whether, as the Crown had been in possession since 1820, the plaintiff would not be barred by the Statute of Limitations.

Quere, also, whether the plaintiff had any claim against the Crown for the moneys paid at the tax-sale; at all events after the tax-sale the parties dealt with the land with notice of the difficulties that existed.

THIS was an action tried before Burton, J.A., without a jury, at Sandwich, at the Spring Assizes of 1884, when the learned Judge entered judgment in favour the plaintiff. His judgment is reported 6 O. R. p. 564.

The facts are fully set out in the judgment.

During Michaelmas Sittings, *Falconbridge* moved on notice to set aside the judgment entered for the plaintiff and enter judgment for the defendant.

During the same sittings, December 6, 1884, *Falconbridge* supported the motion. The grant made on April 3rd, 1818, to Isabella Wigle, was made through mistake, and without any authority from her, as appears by her petition, presented on the 17th June, 1819. She surrendered the lands in question, and the surrender was accepted. It will be presumed that the attorney who executed the surrender had due authority therefor. Even if the surrender itself were not forthcoming, the presumption in such a case would be that there had been a surrender, and that it was duly executed. The Crown, and not Isabella Wigle, owned the land when the taxes were imposed, and the land was not liable to be sold for taxes. On the 8th October, 1839, Horatio Nelson, the assignee of the purchaser at the tax sale, presented a petition to the Governor for a patent, and the patent was refused; and therefore Nelson and those claiming under him, including the plaintiff, have always known the infirmity of their alleged title, and never made any claim until the defendant had purchased and made large improvements. He referred to 59 Geo. III. chs. 7, 8; 6 Geo. IV. ch. 7; *Ryckman v. Van Voltenburg*, 6 C. P. 385; 33 Vic. ch. 23, secs. 1, 2, O.; *McKay v. Chrysler*, 3 S. C. R. 436.

J. H. Ferguson, contra. Upon the evidence the learned Judge who tried the case is correct in holding that the title passed to Isabella Wigle by the patent to her of the 3rd April, 1818, and the defendant has not proved that she was ever divested of title prior to the tax sale. Isabella Wigle being a married woman, could not, as the law stood at the date of the alleged surrender, convey her property other than by deed executed jointly with her husband, and by complying with the other formalities required by 59 Geo. III. ch. 3: *Doe ex d. McDonald v. Twigg*, 5 U. C. R. 167; *Doe ex d. Bradt v. Hodgkins*, 2 U. C. Jur. O. S. 213; *Foster v. Beall*, 15 Gr. 244, 246. Prior to 36 Vic. ch. 18, a married woman could not appoint an attorney to convey her

real estate. *Walkem* on Married Woman's Property Acts, p. 64. It is questionable whether a surrender to the Crown would be perfect without being enrolled: *Regina v. Guthrie*, 41 U. C. R. 148. The defendant took with knowledge of the plaintiff's title under the tax sale. This appears by the defendant's examination. In any case the evidence shews that the taxes for 1820 were charged upon the land prior to the date of the acceptance of the alleged surrender, 20th September, 1820; and, if so, the sale is valid even against the Crown, for by the reconveyance or surrender the Crown could take nothing more than Isabella Wigle's interest, subject to this charge for taxes, and liable to be extinguished by subsequent sale to satisfy such charge: 59 Geo. III. ch. 7, sec. 13; 9 Geo. IV. ch. 3; 6 Geo. IV. ch. 7; *Charles v. Dulmase*, 14 U. C. R. 585; *Doe d. Stata v. Smith*, 9 U. C. R. 658; *Doe d. McGillis v. McDonald*, 1 U. C. R. 432; *Cotter v. Sutherland*, 18 C. P. 357, 398; *Church v. Fenton*, 28 C. P. 384, 4 A. R. 159. There is no merger of the tax by surrender. And the sale is valid if any taxes were in arrear.

January 3, 1885. ROSE, J.—This is a motion to set aside the judgment for the plaintiff and enter judgment for the defendant.

In the view I take of the matter it will be necessary shortly to state the facts, to some of which, the learned Judge, arriving at the conclusion at which he did arrive, deemed it unnecessary to refer.

By Order in Council dated 30th January, 1808, there was a grant made to Isabella Wigle, wife of Wyndal Wigle, as the daughter of Leonard Scratch "a U. E. Loyalist, of 200 acres marked D. U. E. by the Inspector General, under the regulations acted upon 6th July 1804."

No land was located under this grant until the 3rd of April, 1818, when Isabella Wigle, by her agent Alexander McCormack, located the land in question, and a description issued for the said lot on the 13th June of the same year. On the 19th of the same month the letters patent issued, which were recorded on the 7th of July following.

These letters provide, amongst other things, that if the patentee her heirs or assigns do not, within three years, build a house on said premises and reside therein, or cause some person to reside therein (the patentee not owning and being within another dwelling in the Province) or within three years by any deed of bargain and sale, release, exchange, or other conveyance, shall grant bargain, sell, alien, release or convey all or any part of the said land, the patent shall become void—in the latter case as to the portion conveyed only.

On the 17th June following (1819) the patentee presented a petition to the Governor-in-Council in the following terms: "That in *contradiction to a petition* submitted by her before the late war (1812) through Colonel Elliott, and *without any subsequent petition* by her for the purpose, lot No. 16, concession A of Mersea, has been granted to your petitioner as the daughter of a U. E. Loyalist: that this appears to have been done through a *mistake*, kindly meant, *but without any authority from her*, of her agent: that upon enquiry she finds the above mentioned lot No. 16, concession A of Mersea, to be worthless, in evidence thereof begs to submit the following certificate: that under these circumstances she humbly petitions for permission to surrender the patent which was thus *causlessly* issued in her name, and to be favoured with a new grant of such lands as William McCormack, Esq., M.P.; the favorer of this my petition, may indicate in my name."

This petition was signed by the petitioner, and was followed by a certificate as follows: "I, John Hitchcock, of Mersea, solemnly make oath and say, that I have examined lot No. 16 in concession A of Mersea and according to the best of my judgment consider it totally unfit for cultivation, the whole being a black ash and white elm swamp."

This petition was received on the 29th of June, and on the 14th July referred to the Surveyor-General for report. He reported on the 15th July the facts as to Order in Council of January, 1808, and location. On such report leave was granted. We find the following memorandum

endorsed on the petition: "Read 30th September, 1819. Recommended that the lot be surrendered, and leave granted petitioner to locate another lot."

On the 6th September following (1820) the patentee, by her attorney, Andrew Mercer, executed a surrender of the patent and the lands thereby granted.

On the 20th of the same month the surrender was accepted.

On the face of the patent appears this endorsement:

"In Council 20th September, 1820. The surrender accepted.
"P. MAITLAND."

It will be remembered that Sir Peregrine Maitland, K. C. B., was the then Lieutenant-Governor of the Province of Upper Canada.

On the petition appears the endorsement,

"The surrender of the patent, bearing date the 19th of June, 1818, was accepted by His Excellency the Lieutenant-Governor 20th September, 1820."

Also the following:

"Orders issued to the Surveyor-General, Inspector-General, and Attorney-General, 7th November, 1820."

A certified copy of the notice sent to the Surveyor-General was put in. It consisted of a copy of the minutes of Council, held on the 30th September, 1819, as follows:

"In Council, 30th September, 1819. Upon the petition of Isabella Wigle, of the Township of Gosfield, in the Western District, wife of Wyndal Wigle, this day read at the board, setting forth: that under an order in Council of the 30th January, 1808, granting her 200 acres of land as the daughter of Leonard Scratch, of the Township of Gosfield, a U. E. Loyalist, she has received a patent, bearing date the 19th June, 1818, granting to her Lot No. 16, in Con. A., Township of Mersea, containing 200 acres, which lot is totally unfit for cultivation, being composed of a black ash and white elm swamp, and praying that she may have leave to surrender the said patent to the Crown, and receive a patent for another lot of the same number of acres in lieu thereof under the same authority.

"His Excellency, taking the same into consideration, is pleased to order that the patent be surrendered, and leave given to the petitioner to locate another lot under the order in Council of the 30th January, 1808, in lieu."

To which was added:

"In Council, 20th September, 1820.

"His Excellency the Lieutenant-Governor was pleased to accept of a surrender to the Crown of the above-mentioned patent."

I think it was stated at the bar that Louisa Wigle located another lot, and obtained another patent in lieu of the one surrendered (a).

On the 12th July, 1819, 59 Geo. III. ch. 7., was passed, repealing the several laws then in force relative to levying and collecting rates and assessments in the then Province of Upper Canada, and further to provide for the more equal and general assessment of lands and other ratable property.

This Act did not extend to property which belonged to or was in the actual possession or occupation of His Majesty, his heirs or successors, except the Crown and Clergy Reserves actually leased to individuals, which were made liable.

By section 12, it was provided that the Surveyor-General should, *on or before* the 1st of July, 1820, furnish the treasurer of each and every district thereof with a list or schedule of the lots in every town, township, or reputed township, of his respective district, as the same were designated by numbers and concessions, or otherwise, upon the original plan thereof, in which list it should be "specified in columns opposite to each lot respectively, to whom the said lot or any and what part thereof has been described as granted by His Majesty, * * and what part thereof have been leased by His Majesty."

By sec. 13 it was further provided "that all lands described in the said schedule as having been granted or

(a) While judgment was being delivered, Mr. J. H. Ferguson, for the plaintiff, stated that he had not assented to this, and could not assent to it, as he never had had any instructions upon the point.

let to lease by His Majesty shall, from the time they are returned in the said schedule, be assessed and charged to the payment of the rates or taxes imposed by this Act," and the treasurer was authorized to receive taxes "from any person or persons paying the same." And in case of unoccupied land upon which no distress could be found at the proper time for payment, the treasurer was directed at any time thereafter to enter upon the land when there should "be any distress thereupon to be found." and to levy the taxes by distress and sale of the goods in the possession of the occupier.

No power of sale of the land was given by this statute, but by sec. 15 the unpaid rates were to be charged against the lands in the treasurer's account.

By 6 Geo. IV. ch. 7, "promulgated by proclamation, under the Great Seal of the Province, bearing date the 4th day of April, 1825" it was recited that it was expedient to make perpetual 59 Geo. III. ch. 7, except such parts as were thereby repealed, and to render the due collection more certain "by providing for levying, under certain restrictions, the assessments which may remain in arrear, by the sale of a portion of the lands on which the same may be charged."

By sec. 6, the treasurers were required to report to the Quarter Sessions all lands upon which the assessments shall be eight years in arrear after the 1st of July, 1828; and by sec. 7, the clerks of the peace were directed to make out writs "for the levying of the assessments appearing to be due in each township," &c., which writs were to be "directed to the sheriff of each district, respectively, directing him to levy the amount therein stated to be due, together with the fees hereinafter mentioned, *by sale of such portion of the lands and tenements on which the assessments are respectively chargeable, as may be sufficient for that purpose, provided there be no distress upon the said lands from whence the same may be made, and if there be such distress, then to levy the same by sale of such distress.*"

By section 15 it was provided "that nothing in this Act contained shall extend to authorize the sale of any greater or other interest in the reserved lands of the Crown or clergy, held in lease, for payment of arrears of assessments, than is possessed by such lessee or his assignee."

It appears that on the 24th of June, 1820, the Surveyor-General furnished the treasurer of the district in which the lands in question were with a schedule of lots embracing the lot in question specifying that the lot had been "deeded" to Isabella Wigle.

It does not appear that he sent any notification to the treasurer of the surrender after the 7th November.

The contrary is shewn by a certificate, which we will refer to later, and we find that the lots stand assessed on the 5th of January, 1829, from the 20th January, 1820, £1 10s., March 2nd, 1829, to "road assessment" from 6th March, 1820, 18s. 9d. Penalty £1 4s. 4½d., £3 13s. 1½d., for which, with costs of sale, the land was sold on the 31st of October, 1831, and deed given to the purchaser, Peter Scratch, November 8th, 1832, which deed was registered on the same day the consideration named was £4 1s. 7½d. On 29th May, 1839, Peter Scratch conveyed the lot to one Horatio Nelson for the expressed consideration of £4 1s. By an annexed memorandum, Peter Scratch certifies that an old account of £60 formed part of the real consideration. This certificate is dated October 1, 1839.

On the 8th of October, 1839, Nelson petitioned the Governor in Council, Sir George Arthur, for a patent, on the ground that he was assignee of the purchaser at the sheriff's sale for taxes, and "that your petitioner finds that the return of the lot assessed by the Surveyor-General's office was in error, the patent for the same having been surrendered under order in council 30th September, 1820. The return by the treasurer to the sheriff, and the subsequent sale by the sheriff were correct, or, at least, agreeable to the original return, and prays for an order "that the sale by the sheriff having been by error of the Crown be confirmed, and that a patent do forthwith issue * * *."

This petition being referred to the Surveyor-General for report, the following report appears endorsed : " Lot No. 16, in concession A., in the township of Mersea, was described the 13th June, 1818, in the name of Isabella Wigle, and in the returns made to the treasurer in 1820, the above lot was therein returned as described, but it appears that the patent for the same was surrendered by her in September, 1820, but the surrender omitted to be notified to the district treasurer.

On the 20th February, 1840, the following endorsement appears on the petition : " In Council, 20th February, 1840. If the petitioner's title under the land assessment law be good he does not require a grant by letters patent, and if it be not good the Government has no legal power to make a free grant of land."

On the 16th September, 1840, Nelson conveyed to James Blackwood Greenshields for the expressed consideration of £150, and through him and his assignees the plaintiff claims.

On the 21st of February, 1868, the Crown granted a patent of the land to H. L. Hime, of Toronto, for the expressed consideration of \$320, and on November 17th, 1870, Hime conveyed to the defendant for the expressed consideration of \$900.

If the sale for taxes was valid, the plaintiff succeeds. If not, then he fails.

The question as to the validity of the sale is the narrow one, as to whether under 59 Geo. III. ch. 7, and 6 Geo. IV. ch. 7, authority was given to sell the land.

This involves the question as to whether at the time of the assessment in 1820, the title was in the Crown or in Isabella Wigle, and the further question whether, assuming that it was in Isabella Wigle at the time of the assessment in 1820, the subsequent action by the Crown and her devested the title, and re vested it in the Crown ; and the further question, whether, assuming the legal estate to be outstanding in her, the Crown had the equitable title or estate, and if so, whether it was intended by the above-

recited Acts to enable the district treasurer to sell this land.

I find as a fact on this evidence, that the patent issued inadvertently upon the application of a person who supposed he had authority to apply for it, but who in fact had no such authority.

2. That the intention of the Crown was to confer a benefit, and that the patent was issued in ignorance of the fact that at the time of its issue the land was worthless.

3. That at the time of the issue the patentee was not aware of the application for the patent nor of the allotment of the land therein described, and that such allotment and issue were without her consent and in express opposition to a previous petition.

4. That she never accepted the allotment or delivery of the patent, but so soon as she became aware of the fact disclaimed all intention of accepting the same, and called the attention of the Crown to the mistake that had been made.

5. That so soon as the Crown became aware of such mistake it allowed her to "surrender" the patent deed and any interest or title she had in the land, and in pursuance of its original intention and design granted her another lot of land in lieu thereof.

6. That as a matter of law the title never passed to the patentee nor passed out of the Crown, and therefore the Crown was at all times the owner of the land notwithstanding the error and mistake in issuing the patent.

7. That if any title vested in the patentee, the surrender was void and ineffectual as a conveyance to pass any interest out of the patentee.

8. That even if the legal estate vested in the patentee and the surrender was ineffectual to divest it and revest the same in the Crown, the action of the patentee in applying for and obtaining another lot in lieu thereof, created an equity in favour of the Crown entitling it to the possession of the land and to dispose of the same, and that as against the patentee at all events, the possession of the land was in the Crown immediately upon the surrender.

9. That the mistake of the Crown and the assumed agent of the patentee leading to the return of the lot to the District Treasurer, and the subsequent mistake of an officer of the Crown in not notifying the treasurer of the surrender, could not make the land liable to be sold for taxes as against the Crown.

If such facts would make the land liable to be sold for taxes, it is difficult to see how land patented and returned as patented to the District Treasurer, and forfeited during the three years for not building a house, or for conveying it away, would not also be saleable for taxes; and no authority has been shewn for such a proposition. Land has been held saleable prior to patent issued when the effect of the sale has been to vest the title to the land in one who, by purchase at such sale, acquired the right to obtain the patent, but no authority has been shewn for sale of land belonging to the Crown, because for a period prior to the sale the land was chargeable with taxes.

From the fact that the statute only authorized the sale of land for taxes after no distress found or insufficient distress, and from the fact that no distress could have been levied on this land as against the Crown, and that no one was authorized to occupy the land, it is clear it was not intended to authorize its sale.

If as a matter of law it could be held that the Crown is to be taken to be in possession of land to which it had an equitable title only, it might be argued that as the Crown has been in possession since 1820, and by consequence neither the plaintiff nor those through whom he claims ever have been in possession, the Statute of Limitations affords a bar to the plaintiff's claim.

This question was not discussed, and in the view I take of the matter it is not necessary to consider it.

Whether the parties have any claim upon the Crown's consideration for the moneys paid at the tax sale is not for us to consider. Certainly after the Crown refused to grant a patent to Horatio Nelson the parties dealt with the land with full notice of the difficulties that existed.

For these reasons I think the motion entitled to prevail, and that the judgment for plaintiff should be set aside, and judgment entered for defendant with costs, and costs of this motion.

The plaintiff has no claim against the defendant, in my opinion, unless he has paid taxes since the defendant purchased the land. If so, the solicitors no doubt can agree upon the amount, which can be deducted from the costs to be paid by the plaintiff to the defendant.

CAMERON, C. J.—I am of the same opinion. The learned Judge at the trial on the material before him, held that the surrender of the land by the intended patentee, Isabella Wigle, was inoperative and void, not having been properly executed, and there is no doubt if the rights of the parties depended upon the validity of the surrender, assuming the title to the land at the time of the alleged surrender to have been vested in the said Isabella Wigle the judgment in favour of the plaintiff claiming under the tax title would have to stand. But the rights of the parties do not depend upon the validity of the surrender. The land, on the facts before the Court, and fully detailed by my brother Rose, never passed to Isabella Wigle. The title the Crown intended to give her never vested in her as she never accepted it, but on the contrary disclaimed in effect if not in direct terms to accept the grant. Her attempt to surrender, which unexplained might furnish some evidence of acceptance, fails to have weight taken in connection with her petition praying in effect that she may not be treated by the Crown as having accepted the land granted, because it was located to her by mistake, and in contradiction, as she puts it, of her former petition praying that a grant might be made to her. The informal surrender, therefore, was taken more as a precautionary than as a necessary act. She received, it was not disputed on the argument, another grant in lieu of that she had thus repudiated, and she would, as between party and party, now be estopped from making claim to this land, and is

equally so as against the Crown (a). Surely a stranger cannot be allowed to make her title a valid one against the Crown and her own desire. At most it was her interest or right that was conveyed by the tax sale, and if she had no title and no interest, the purchaser at sheriff's sale, and those claiming under him, could have no better right than she had. The land never was liable to assessment, and so there could be no taxes charged against it, or arrears in respect of which it could be sold. There is no doubt, as matter of law, that under the statutes under which the sale for taxes in this case proceeded, lands described for patent are liable to be sold whether the Crown has or has not granted a patent therefor.

It was so decided in *Doe d. McGillivray v. McDonald*, 1 U.C. R. 432, from which I make an extract from the language of the late Chief Justice Robinson, as being applicable to the circumstances of the present case: "The fact is, that this statute, 59 Geo. III. ch. 7, furnishes no new ground for such a question," (that is, that the lands of residents and non-residents were not equally liable to be sold for taxes,) "for both the proviso and the clause which serves as a qualification of it, were merely transferred from the former assessment laws, which that Act repeals.

The 43 Geo. III. ch. 12, and the two subsequent Acts of 47 Geo. III. ch. 7, and 51 Geo. III. ch. 8, are in the same terms in this respect; and looking at them all or any of them separately, it is plain that what the Legislature meant was that neither the lands in the actual possession and use of the Crown nor its vacant and waste lands should be taxed, but that lands which the Crown had granted to individuals by order in council or certificate, were for the purposes of those Acts to be regarded as no longer belonging to the Crown, but to the individual, at least until the Crown should rescind its order, and resume the lands for some failure on the part of the grantee."

The Crown, in the present case, did, in effect, rescind the grant made to Isabella Wigle in 1819, and the Crown has

(a) See note ante p.

assumed ever since to have been seized of the same, and it appears to me it is not possible to set up the tax title in opposition to the second patent under which the defendant makes title.

It may not be without profit to refer, as to the effect of a grant of land before the assent of the grantee has been obtained, to the language of Lord Chief Justice Campbell, in *Siggers v. Evans*, 4 E. & B. 367, at p. 381: "It seems to have been adopted as a rule of law, from the earliest times, for the purposes of convenience, that as generally grants are for the benefit of the grantee he may come in at any time and say, 'I claim by the deed,' if he has done nothing to shew a dissent; but that he has the full power, if he has done no act to assent, to say that he declines and will have nothing to do with the deed if he is charged with any burthen arising from it, or does not choose to take under it."

The language of the Judges is even stronger in the case of *Townson v. Tickell*, 3 B. & Al. 31, where Abbott, C. J., at page 36, said: "The law certainly is not so absurd as to force a man to take an estate against his will. *Prima facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift."

Bayley, J., at page 38, uses language which may be pertinently applied to this case, though there is not here a renunciation by deed as there was in that case. It was: "Here is a renunciation by a most solemn act, viz., by deed; and by that he has said, that he did not choose to accept that which is devised to him. It seems to me, that the effect of that is that the estate never was in him at all. For I consider the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses he is in the same situation as if the offer had never been made; and that being so, I am of opinion that the disclaimer in this case was sufficient."

Holroyd, J., at page 38, said : "I think that an estate cannot be forced on a man. A devise, however, being *prima facie* for the devisee's benefit, he is supposed to assent to it until he does some act to show his dissent. The law presumes that he will assent until the contrary be proved ; when the contrary, however, is proved it shews that he never did assent to the devise, and, consequently, that the estate never was in him." And, at p. 39, he added : "It seems to me, therefore, both upon the reason of the thing and the authority of this case, (*Bonifaat v. Greenfield*, 1 Leon. 60, Cro. Eliz. 80) that the disclaimer need not be either by matter of record or by deed."

The position of Isabella Wigle may be stated thus : As the daughter of a U. E. Loyalist she was entitled to a grant of land, and while the right might be in the grace of the Crown it was after all a *quasi* legal right—that the Crown intending to recognize her right made a grant of the land now in question. This she protested against, and asked the Crown not in implementing her right to force upon her that which she deemed worthless, but to give her the land she asked for. The Crown, recognizing the force of her position, accepted her surrender, or renunciation, or whatever it may be called, without regard to the technical legal effect or significance of the word used, and made her a grant of other land, and thus recalled the unaccepted offer which the former grant may, as was put by Bayley, J., in the case to which I have referred, be said to have been. I think there can be little doubt that the purchaser at the tax sale was aware of all the facts, though they do not appear to be proved, as his vendee applied to the Crown for a deed recognizing, as it were, the valuelessness of the purchase he had made.

I am therefore of opinion, both as a matter of law and natural justice, that the judgment for the plaintiff should be set aside and judgment entered for the defendant for the costs of the action.

GALT, J., concurred.

Motion allowed.

21—VOL. VIII O.R.

[COMMON PLEAS DIVISION.]

GRIEVE V. THE MOLSONS BANK.

New trial—When granted on weight of evidence—Bank manager—Authority of.

On application for a new trial upon the weight of evidence, where there has been no miscarriage in law, the question is, does the verdict in the opinion of the Court do substantial justice; and, if not, is the evidence in their opinion sufficient to warrant interference.

In this case where the verdict rested entirely upon the plaintiff's testimony as opposed to that of two witnesses not interested, the Court were of opinion that the verdict did not do substantial justice, and a new trial was granted.

A bank manager is not acting without the scope of his authority in accepting the cheque of a customer to deliver to another customer on a particular day, or on the happening of a specified event.

THE plaintiff brought this action to recover from the defendants a sum of money under the following circumstances: The plaintiff having \$600, wished to deposit it in the defendants' bank at Trenton. When he got to the town of Trenton, which was about thirteen miles from his place of residence in the township of Sidney, according to his evidence, he found the bank was closed, and having had some slight business dealings with one Henry Coons, a grain merchant in Trenton, he went to see him to ascertain whether he could see Mr. Fraser, the agent of the defendants in Trenton, and get him to take the money after banking hours. Mr. Coons went to find Mr. Fraser, and the plaintiff met them in about an hour afterwards on the street. They all went to the bank together. The plaintiff deposited the money. Mr. Coons then said that he would like to get the money, if the plaintiff would loan it, and said that if he, plaintiff, wanted a recommendation he thought the manager of the bank would give it, and asked the manager if he would not do so. The manager then told the plaintiff what Coons was worth, representing that he had between three and four hundred acres of land, and about one hundred acres in crop of fall wheat, and that he thought

he was worth \$60,000: that he, plaintiff, then said he did not know about loaning the money at that time, that he was unsettled where he was, expected to leave his place and would not know for a time, but thought he would know in two or three weeks. Then Mr. Coons wanted to know if notes could not be drawn up, and if the plaintiff made up his mind to let him have it, he was to send word to the bank. Mr. Fraser said he, thought that could be done, and it was done. Notes were drawn up, one payable on demand for \$100, and one payable in six months for \$500. The two notes were made as the plaintiff thought he might require \$100 to use along in the spring. Coons wished to get the money for a year, but Mr. Fraser thought the note should be taken at six months, and could then be renewed.

The plaintiff, on the same day, the 27th January, 1883, drew a cheque for \$600, payable to himself or bearer, and left it with the manager of the bank to be handed to Mr. Coons if the plaintiff sent word to him to do so. The plaintiff took both the notes with him.

The account of the transaction given by Donald Fraser, the defendants' agent, was that the plaintiff came into the bank on the 27th January, and told him that he was thinking of lending a man named Henry Coons some money which he had. He asked as to Coons's standing; witness told him what he thought of him at the time; what he had in the shape of land and crops, and of the grain business he was carrying on. The plaintiff seemed satisfied and left with the intention of seeing Coons. Before this Mr. Coons had come to the bank and told witness that a man from the back country had come to see him and wished to lend him some money, and he, Coons, had referred him to witness for his standing. Shortly after the closing of the bank the plaintiff and Coons came into the bank and said they had come in for witness to draw up the papers. The plaintiff said he had concluded to let Coons have the money, and he wished witness to draw up the documents. They had arranged that Coons was

to have the money for twelve months. Witness said he did not care about making out a note for twelve months, but would make it for six months, and he could renew it. The plaintiff said he was on the eve of negotiating a loan out near home, and would not know for a while whether he would or not; but would take Coons's notes, go home, and notify witness at once if he concluded the bargain. He said witness was to hold the money for three or four days, and if he did not notify witness in that time witness was to let Coons have the money. The plaintiff said that he would probably require \$100 for present necessities, and would like to get it from Coons at once as he might require it. Witness said he would make out a demand note for \$100, and a six months' note for \$500. Witness told plaintiff it would be necessary for him to leave a cheque to enable witness to pay the money out to Mr. Coons. Witness made out a cheque, which the plaintiff signed. The plaintiff was to return the notes if he lent the other party the money, or if he used it. On Thursday, the fourth day after, Coons went to witness and said the time was up, and asked witness if he had heard from the plaintiff. Witness said he had not heard, and the money was then passed to Coons's credit, and afterwards chequed out in different sums. Coons was a large customer of the bank.

Henry Coons's account of the transaction was : The plaintiff came into his office about 11 o'clock ; stated that he had some money that he wished to deposit for a short time, and wished to know where he had best deposit it, and if he could get into a bank. Witness told him of the different banking institutions in the village, and referred him to Molsons Bank as being the only general bank in Trenton. Witness asked him about what time he was going to let his money, and made an offer to hire the money. He said he was only going to deposit the money for a short time, on account of his having some speculation he might be obliged to put his money in, and if he did put it in he could not let witness have the money. Witness thought

he referred the plaintiff to Mr. Fraser for a recommendation as to his standing. The plaintiff said he had some business, would go out and call again. He went out and called again in an hour, about 2 o'clock or along there—may be it was 3 o'clock. Witness went with him to the bank. Before that witness had gone to the bank and talked with Mr. Fraser. When the plaintiff and witness went to the bank it was closed, it being Saturday. Witness told Mr. Fraser the circumstances. The plaintiff wanted to deposit the money for a few days, until he went home and ascertained whether he was going to use money in the business he talked of putting it in, and in order that witness could have the money without the plaintiff coming down notes for the amount were drawn up and a cheque left at the bank to draw the money out on. They talked over the mail; something about the return of the mail; to know in how many days he could get home and send the notes back to Trenton, provided he could not let witness have the money. Witness did not understand anything about sending word but that he was to go home and ascertain for a fact whether he was to use the money, and if he was he would send the notes down by mail; and if not, witness was to have the money. Witness got the money four days after the time plaintiff was there.

On the 17th February the plaintiff gave a cheque for \$60 to one W. J. Turley on the defendants, which was honoured by the bank. When produced to the teller he said there was no account with the maker, but Mr. Fraser, the agent, told him it was all right and he paid it. Mr. Fraser also paid to the plaintiff \$40. There was a difference between Mr. Fraser and the plaintiff as to whether this payment was made before or after the cheque for \$60. The plaintiff swore it was after and Mr. Fraser before. Mr. Fraser said he got both these sums from Coons, and the \$40 did not pass through the bank books at all. The plaintiff alleged that he got these sums on account of the deposit, while Mr. Fraser said they were paid on account of the note for \$100 payable on demand.

The plaintiff also admitted having received from Mr. Fraser the sum of \$17.45 interest on the \$500 note on the 28th of July, 1883, and from Coons the sum of \$10 on the 11th of September, 1883.

It appeared that Coons had large transactions with the bank, and that he was liable on the 27th of January, when the deposit was made and cheque given, for \$22,000, supposed to be secured by warehouse receipts on grain, and that when the note became due he was in insolvent circumstances and unable to meet his liabilities. The plaintiff applied to him frequently for payment after he knew the bank had paid him the money, but made such applications, as he said, at the instance of Mr. Fraser.

The learned Judge left the case to the jury with a charge not unfavourable to the defendants, telling the jury that the question of the liability of the defendants depended on whether Mr. Fraser improperly and without authority from the plaintiff handed the plaintiff's cheque over to Coons.

The jury found that the defendants improperly paid over the plaintiff's money, and assessed the damages at \$527.

During Michaelmas Term, November 20, 1884, *G. H. Watson* obtained an order *nisi* calling on the plaintiff to shew cause why the verdict should not be set aside and judgment entered for the defendants, on the ground that the finding of the jury and verdict were not supported by the evidence, and the great preponderance and weight of evidence were in favour of the defendants, and there was no contract or legal liability established to sustain the action, or, in the alternative, for a new trial on the same grounds.

During the same sittings, November 27, 1884, *G. W. Watson* supported the motion.

Clute, contra.

January 3, 1885. *CAMERON, C. J.*—While the case is not entirely free from doubt, I am of opinion the weight of evidence is strongly against the probability of the plaintiff's account of the transaction being the correct one. The

witnesses Fraser and Coons have far less interest in the question than the plaintiff. Fraser is no longer in the service of the defendants, and apparently can have no motive for representing the transaction other than as he recollects or believes it to have been.

It is possible of course that he may be liable to the bank for neglect of duty in improperly paying the cheque, but there is nothing in the evidence that shews on what terms he left the bank, and he may, if any liability ever attached to him, have been released. There is therefore nothing from which it can be inferred he has any pecuniary interest in the matter, and he must be regarded as disinterested and his evidence considered as that of an uninterested witness.

It is then quite opposed on the important point of the way in which the plaintiff was to act if the cheque left by the plaintiff was not to be given to Coons. The arrangement at best was unbusiness like ; but the fact that the plaintiff took with him and retained Coons's notes makes it more likely that if he did not return them in a few days the cheque was to be given to Coons, and the money paid thereon by the defendants to him, than that he should be allowed to retain them, and have an indefinite time to decide whether he could lend the money or not. The witness Coons has no interest in the matter whatever. He is liable on the notes having received the money, and it can signify nothing to him whether his liability is to the plaintiff or to the defendants.

Under the old law, before parties were permitted to give evidence in their own behalf, the plaintiff would have been forced to rely on the evidence of Fraser or Coons to make out a case. On the evidence of either he must have been nonsuited, and though it may be as the law now stands a jury can find in a plaintiff or defendant's favour upon his uncorroborated evidence against the positive testimony of any number of unimpeached witnesses, the Court must, in such a case, unless the surrounding circumstances and probabilities support in other respects the party's uncor-

robolated testimony, interfere by the just exercise of its controlling discretion to prevent a miscarriage of justice, and grant a new trial.

There is not perfect agreement between Fraser and Coons as to the purpose for which the plaintiff might require the money to prevent its being loaned to Coons, but it was a matter that did not at all concern Mr. Fraser, and he did not profess to have any clear recollection upon the point. He gave, therefore, merely his impression about it. He would, however, seem to be clearly in error in stating that the \$40 paid to the plaintiff was paid before the \$60 on the cheque to Turley, of the 17th February. This is also unimportant except in so far as it indicates a want of clear recollection of the circumstances, and thus weakens the force of his statements as to what took place at the time the arrangement was made. The fact that the plaintiff obtained two sums which, together, amounted just to the sum for which the note payable on demand was given, is one of the circumstances that would lend probability to the transaction having been as Fraser and Coons represent it, though it is not absolutely inconsistent with the plaintiff's account. When he obtained these two sums he was the holder of the notes, and he ought not while he retained these notes to have attempted to exercise any dominion over the money, except in accordance with the notes; and then the acceptance of the interest and its endorsement on the note for \$500 was wholly inconsistent with the plaintiff's right to look to the bank for the money.

Unless, then, as was contended, the Court has no right, under the circumstances, to direct a new trial, the case ought to be submitted to another jury. When a new trial will or will not be granted upon the weight of evidence, where there has been no miscarriage in law, must depend upon the circumstances disclosed in the case under consideration.

There is no positive rule that can be followed. Suffice it to say, that the verdicts of juries ought not to be set

aside capriciously, as was said by Jessel, M. R., in *Jenkins v. Morris*, L. R. 14 Ch. D. 614, at p. 684. Nor where the evidence is so evenly balanced that it must be leaving it to the mere chance of another jury taking a different view from the one appealed against, to send the case to a second trial. The dissatisfaction of the Judge who tried the case with the verdict is not of itself a sufficient ground for interfering with it. The verdict should be such "as reasonable men ought not to have come to" to justify its being set aside on this ground. This I take to be the effect of the observations of the Court in *Solomon v. Bitton*, 8 Q. B. D. 176, 177.

It may well be asked what in fact is the effect of the language, "such as reasonable men ought not to have come to?" All men are assumed to be reasonable, and unless circumstances shew that the jury has acted corruptly or from improper motives their finding would be the finding of reasonable men, and the verdict of a jury would become unassailable in the absence of evidence of their being influenced by corrupt or improper motives. A Court composed of three reasonable men would be otherwise determining that twelve reasonable men, acting in accordance with their reason, were unreasonable. Thus it comes back to this: does, in the opinion of the Court, the verdict do substantial justice; and, if not, is the evidence sufficient, in that opinion, to invoke the discretion appealed to to interfere to warrant such interference? If it is, then the Court should exercise its discretion. Here we do not think the verdict does do substantial justice, and the evidence sufficiently shews it to call for the exercise of the discretion that undoubtedly the Court has the power to exercise.

There remains to be considered a question presented on the argument, and which then appeared to be entitled to some weight, viz: whether under the circumstances Mr. Fraser, the defendants' manager, must not be regarded in taking the cheque to be delivered to Coons as the agent of the plaintiff, and if he failed in the duty he assumed he, individually, and not the defendants, would be responsible

to the plaintiff for any loss suffered in consequence. But on consideration it appears to me there is nothing in the contention. I do not think the bank can be in any better position than it would have been in if the plaintiff had given the cheque to Coons for his notes which he refused to give, and then the plaintiff notified the manager before the cheque was presented not to pay it, and notwithstanding the bank paid. The notice would not be more direct to the defendants than it was in this case; and assuming the plaintiff's contention to be right, there can be no difference in principle because in this case the notice was not to pay unless a particular event happened, and where it is not to pay at all. It is not merely the improper delivery of the cheque to Coons that is complained of, but its payment by defendants with notice of the fact through their agent that Coons was not entitled to it. Moreover, it cannot be said that a bank manager would be acting without the scope of his authority in receiving the cheque of a customer to deliver to another customer on a particular day, or the happening of a specified event.

The verdict should be set aside, and a new trial had between the parties with costs to abide the event of the second trial.

ROSE. J.—As my brother Galt, before whom the case was tried, is dissatisfied with the verdict, and as the learned Chief Justice upon a perusal of the evidence is also of the opinion that there should be a new trial, I concur.

I confess I was much pressed with Mr. Clute's argument, and had my learned brothers come to a different conclusion, I think I could have followed them.

GALT, J., concurred.

Order absolute.

[COMMON PLEAS DIVISION.]

STEARN V. THE PULLMAN CAR COMPANY.

Railways—Sleeping cars—Loss on—Liability—Negligence.

The plaintiff was a passenger on one of defendants' cars occupying a sleeping berth. Before going to sleep he had undressed himself and had put his pocket book containing his money in his trousers' pocket, rolling up his trousers and putting his suspenders around them, and then placed them under his pillow next the wall. When he was called before arriving at his place of destination, he discovered that his pocket book and money were gone. No negligence in the defendants was shewn.

Held, that no liability attached to the defendants.

THIS was an action tried before Cameron, C. J., and a jury, at the Fall Assizes of 1884, who directed a non-suit.

During Michaelmas Sittings, *Britton*, Q. C., obtained an order *nisi* to set aside the nonsuit, and for a new trial.

During the same sittings, November, 19, 1884, *Britton*, Q. C., supported the order.

Bethune, Q. C., contra.

The arguments sufficiently appear from the judgment.

January 3, 1885. GALT, J.—This action is brought to recover a considerable sum of money which the plaintiff alleges was stolen from him while he was a passenger in one of the sleeping cars of the defendants, and asleep. The story told by the plaintiff is, that on the night of the 27th of June, 1878, he occupied a sleeping berth, and went to bed, having previously undressed himself, and having taken off his trowsers he rolled them up and put the suspenders round them, and placed them under a pillow, and put them under his head next the wall, and went to sleep; he had placed his pocket book containing the money in the pocket of his trowsers. He intended to stop at Kingston. When he was called before arriving at Kingston he got up, and when he came to get dressed he noticed it was all loose, and when he put

his hand in his pocket the pocket-book and money were gone.

There was no other evidence. The plaintiff himself admits in answer to the question, "Did you see any thing you thought was negligent on the part of the porter or conductor; you said before you did not?" A. "I cannot say that I saw any thing to indicate that either porter or conductor had been negligent on that occasion." "I did not see it myself; whatever he says that is enough, I say so now, I did not see any thing myself."

He then proceeds to state he thought there was negligence, because a man had got off the train at Edwardsburg; but it does not appear whether that man had been a passenger in the sleeping car, or whether he was simply a passenger on the train; and, moreover, the man had left the train before the plaintiff discovered he had lost his money, so there was no reason whatever to suspect him of having done any thing improper.

Mr. Britton relied very strongly on a case of *Pullman Car Co. v. Gardner*, before the Supreme Court of Pennsylvania, in error from the Court of Common Pleas, reported in the Albany Law Journal for January, 1884, p. 8, 9.

That was an action brought by the respondent against the appellants to recover the value of a watch and a sum of about sixty dollars that had been stolen from him while asleep in one of the cars of the defendants, in which the respondent was successful both in the Court below and in the Supreme Court. But that case differs essentially from the present. At the trial it was proved that by the regulations of the company it was the duty of one of the porters to be continually on the watch during the night.

To quote the words of the learned Judge in his charge to the jury : "We have it in evidence that the company has done its whole duty as a company. They require a constant watch to be kept by some person in the body of the car where the sleepers are, watching continuously. * * If watch was kept by one I apprehend it would be sufficient. * * They kept a guard according to their regulations, and intended

to keep a continuous watch, so that a man sitting there could see every thing that was going on without interfering with the sleepers. He would have no business to be away except in a special case." It appears from the evidence that a coloured man, one of the porters, was put in charge by the conductor, and that it was his duty to stay in the aisle continuously to watch there until daylight, and by his own admission he went out of the aisle to black a pair of boots. The learned Judge then directed the jury that "if he went out of that aisle, even for a very few minutes, and during that time this robbery occurred, and the jury believe that if he had been in his place of observation, it would not and could not have occurred without detection, the company is liable, because he failed to do his duty to that extent that it allowed this robbery to be done. It was his fault, and it is visited on the company although they may have done every thing they thought right to get a proper man."

This was the question on which that case turned.

It is plain there is nothing of the kind before us. All that is alleged is, that the plaintiff lost his money while a passenger on board a car of the defendants, and therefore the defendants are liable, although it is not shewn or alleged that either they or their servants were guilty of any negligence, a position which is not borne out by Gardner's case, nor by any other of which I am aware.

ROSE, J.—I agree that the rule must be discharged. Unless the mere fact of loss is presumptive evidence of negligence on the part of the company, and of such negligence as would render them liable to make good the plaintiff's loss, there is no evidence to entitle the plaintiff to call upon the defendants to offer defence, and the nonsuit was right.

There is much common sense (if I may be allowed to use the expression) in the charge of Matthews, J., in the case of *Pullman Palace Car Co. v. Gardner*, reported in Appeal, Albany L. J., of 1884, at p. 8, 9, where he told the jury that "in the case of a Sleeping Car Company, the great

convenience and inducement held out to passengers is that they will give them a comfortable night's rest. They notify them they will make them pay for it, and say to them you may go to sleep. The principal part of the arrangement is the advantage the passenger will have over the ordinary car in that he can lie down and go to sleep." He continues : " When you have gone to sleep, of course, you can't take care of yourself. Everybody knows that, and for that very reason, the fact that the company notifies you to lie down and shut your eyes, and go to sleep, and thus become helpless, it is their duty to take care of you while you do sleep ; not that they are insurers ; not that they say you shall not be robbed or cannot be robbed; but they will use reasonable and ordinary care to prevent people intruding upon you, and picking your pockets or carrying off your clothes while you are asleep."

While I agree that the plaintiff in this case fails, I do not say no state of facts could be presented to the Court upon which the defendants would be held liable.

To shew the caution which should be exercised in determining such liability, I give the closing words of the judgment of Weldon, J., in the *Pullman Palace Car Co. v. Smith*, 24 Am. R. 258, 262 : " Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railway company ; and if appellant were a carrier, it would not be liable for the loss in this case because the money was not delivered into the possession or custody of the appellant, which would be essential to its liability as carrier," citing *Tower v. Utica and Schenectady R. W. Co.*, 7 Hill 47. He adds, " In *Redfield American Railway Cases*, 138, it is said : ' But it has never been claimed that the passenger carrier is responsible for the acts of pickpockets at their stations, or upon steam-boats and railway carriages.' "

He continues : " It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its custody at all, of which it had no information, and which the owner had concealed upon his

own person. The exposure to the hazard of liability for losses through collusion for pretended claims of loss where there would be no means of disproof would make the responsibility a fearful one. Appellee assumed the exclusive custody of his money, adopted his own measures for its safe keeping by himself, and we think his must be the responsibility of its loss."

I cite this language to shew that when we adjudge such a company liable, it must be on clearly defined principles, and upon the clearest evidence.

CAMERON, C. J., concurred.

Order discharged.

[CHANCERY DIVISION.]

MACDONALD V. MCLENNAN.

Will—Construction—Trust for maintenance and education—Duration thereof—“Steadiness.”

A testator by his will, dated May 31st, 1872, after several specific bequests, gave the residue of his real and personal estate to his trustees upon trust to pay to each of his daughters, J. and L., for life, the annual allowance of \$800 each, which they were then receiving, to be paid to them semi-annually, and to pay for the education, maintenance and ordinary requirements of his son G., and then proceeded : “ And I direct my trustees in their discretion, if they find my son G. deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate, and if my said trustees are satisfied as to his steadiness they are to treat my said son G. in respect to the said allowance in the same manner as my said daughters, J. and L. * * * It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct.”

Held, that George was only entitled to his maintenance and education during minority, for there was nothing in the will to indicate an intention to extend the trust for maintenance and education beyond that period.

Held, also, that George was not entitled to any annual allowance in addition to his maintenance and education during his minority, and the amount which might be paid him after attaining majority, as an annual allowance, rested on what the trustees in their discretion might deem warranted by the estate. For by treating G. in the same manner as J. and L. the testator referred only to the mode of payment, and the power of disposing of the principal, not to the amount of the allowance.

THIS was an action brought by George Sandfield Macdonald for the construction of the will of his father, the late Honourable John Sandfield Macdonald. The defendants were beneficiaries under the will, and the trustees therein named.

The provisions of the will and circumstances of the case sufficiently appear from the judgment and foot-notes.

The matter came up by way of motion for judgment on November 28th, 1883.

J. Bethune, Q. C., for the plaintiff. The plaintiff is entitled under the will to both maintenance, &c., and the annual allowance, and to have the disposal of the capital necessary to produce the allowance. The testator's inten-

tion was to put him on the same footing as the daughters Josephine and Louise.

C. Robinson, Q. C., and A. H. F. Lefroy, for the defendants other than the trustees. Looking at the will as a whole, the testator means to give those children who were of age \$800 a year, and as to the plaintiff, that while a minor he should be educated and maintained, and after his majority should have \$800 a year like the daughters. George was to be put on the same footing as Josephine and Louise, not as Adele, therefore it is not likely he meant an allowance before majority. Maintenance and education probably do not extend to professional education. As to the duration of maintenance, see *Soames v. Martin*, 10 Sim. 287; *Gardner v. Barber*, 18 Jur. 508; *Wilkins v. Jodrell*, 13 Ch. D. 564.

Hoyles, for the trustees.

January 9th, 1884. PROUDFOOT, J.—The Hon. John Sandfield Macdonald, by his will made on the 31st day of May, 1872, after several specific bequests, gave the residue of his real and personal estate to his trustees upon trust to continue to pay to each of his daughters, Josephine and Louise, for life, the annual allowance of \$800 each, which they were then receiving; to pay to his daughter Lilla an annual allowance for life of \$800; and to his daughter Adele an annual allowance of \$600, up to and until her marriage, and after her marriage for life the annual allowance of \$800; and to pay to his wife the annual sum of \$1200, during her natural life, and to pay for the education, maintenance, and ordinary requirements of his son George.

The testator then proceeds to say: "And I direct my trustees in their discretion, if they find my son George deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate; and if my said trustees are satisfied as to his steadiness they are to treat my said son George, in respect to the said allowance, in the same manner as my

said daughters Josephine and Louise. I direct that the said annual allowance hereinbefore directed to be paid to my wife and my said sons and daughters, shall be paid semi-annually, on the first days of January and July in each and every year. It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct. * * I direct that if the estate hereinbefore devised and bequeathed to my said trustees upon the trusts aforesaid prove sufficiently productive from the investment of the proceeds of sales of real estate and the income derived from my personal estate, my said trustees shall from time to time, and at least every two years, allot to my daughters and my son George the *pro rata* distribution of what can be spared."

George brings this action, claiming that until his professional education is completed (he is now studying for the law), the expenses of his education and of his maintenance and ordinary requirements should be paid by the trustees in addition to the annual allowance of \$800. And he claims that he is entitled to that allowance from the death of the testator, in addition to what is required for his education, maintenance, and ordinary expenditure, and he claims that the money set apart to produce the allowance payable to him should be invested subject to the approval of the plaintiff (a).

The trustees admitted by their counsel at the hearing that they were satisfied with the plaintiff's steadiness. By

(a) The plaintiff's claim was thus expressed in his statement of claim :

12. The plaintiff claims that upon a true construction of the said will he is entitled to such annual allowance from the date of the testator's death, in addition to the amount required for his education and maintenance and ordinary requirements, but the defendants, the trustees, refuse to pay the plaintiff the portion of such annual allowance which accrued during his minority, and during the time he was engaged in acquiring his University education hereinafter referred to.

12. The plaintiff has received a University education, and is now pursuing the study of the law, intending to proceed to the degrees of barris-

their statement of defence they object to making separate investments of the capital to produce the plaintiff's allowance, and submit that the investment of the capital is entirely in their discretion, and not subject to the approval of the plaintiff.

The other beneficiaries under the will submit that the plaintiff is not entitled to any annual allowance from the date of testator's death in addition to maintenance, &c., and that the plaintiff is only entitled after the completion of his education to such annual allowance as the trustees in their discretion may deem warranted by the proceeds of the income, and if satisfied with his steadiness, and in respect to such allowance they are to treat the plaintiff in the same manner as the defendants Josephine and Louise.

In 1872, when the testator died, all the legatees were of full age except Adele, who was eighteen, and George who was twelve years of age.

George was clearly entitled to education, maintenance, and ordinary requirements. This is a provision that ceases with minority : *Pride v. Fooks*, 2 Bea. 430 ; *Coster v. Coster*, 1 Keen 199 ; *Badham v. Mee*, 1 Russ. & M. 631. Where a sum was set apart and the interest directed to be applied for maintenance and education, but there was no bequest of the principal, and where the donee was to have future maintenance out of the property in the funds, the words were held to confer a life interest : *Soames v. Martin*, 10 Sim. 287 ; *Kilvington v. Gray*, 10 Sim. 293. *Gardiner v. Barber*, 18 Jur. 508, is said to have overruled *Soames v.*

ter-at-law and solicitor of the Supreme Court of Ontario, but his professional education has not yet been completed.

14. The plaintiff claims that until his professional education is completed the expenses of such education and of his maintenance and ordinary requirements should be paid by the defendants, the trustees, in addition to the said annual allowance of \$800 per annum, but the trustees have only paid the expenses of the plaintiff's education and of his maintenance and ordinary requirements up to the time he attained his majority, and the subsequent expenses thereof have been borne by the plaintiff.

The plaintiff further claims that the moneys set apart to produce the allowances payable to him, should be invested subject to his approval.

Martin, but in *Wilkins v. Jodrell*, 13 Ch. D. 564, Hall, V. C., followed it.

So when a fund is set apart for maintenance during the life of A., or during any other specified period, the trust does not cease on reaching majority:—*Longmore v. Elcum*, 2 Y. & C. C. C. 363; *Bayne v. Crowther*, 20 Bea. 400; *Brocklebank v. Johnson*, 20 Bea. 211, 212. In *Hamley v. Gilbert*, Jac. at p. 361, it is said that education ceases when the infant comes of age, and does not extend to giving auxiliary benefits in the future course of his life.

There is nothing in the will, in this instance, showing any indication of an intention, by the testator, to extend the period during which George should be entitled to require maintenance and education beyond the time the law would otherwise give him; and no sum is set apart specifically for maintenance out of the income of it. George's absolute right to maintenance and education then ceased on attaining his majority.

The other provision for George, the annual allowance, if found deserving, and if the trustees are satisfied as to his steadiness, is one that *as to amount* depends entirely upon the discretion of the trustees, having regard to the income of the estate. "In their discretion" they are to make the allowance, and when that is determined they are to treat George in respect to the allowance in the same manner as Josephine and Louise. This, I think, refers to the mode of payment, in half-yearly instalments, and giving the power to dispose of the capital, necessary to produce the allowance, by will. The trustees may, no doubt, if the circumstances of the estate warrant it, make the allowance the same as that of Josephine and Louise—\$800 a year—but there does not seem to me to be anything requiring them to make it that or any particular sum.

The general scheme for the disposal of the residue would seem to exclude the notion that the allowance to George was to be in addition to the provision for maintenance and education, or that it was to begin from the death of the testator. The testator does not direct George to be placed

on the same footing as Adele, who was under age, but as Josephine and Louise who were adult, and it was probably his intention that the allowance should not begin till majority. An ample provision was made for George's maintenance and education during minority, and it can scarcely be imagined that the testator conceived it probable or possible that the trustees could, upon inspection, satisfy themselves of the steadiness of a boy of 12 years old. Time must elapse before such a conviction could be attained, before the character could be formed, and a reasonable degree of certainty as to its stability reached, and it is not straining language to infer that the undefined time should cover the whole period of minority.

The testator had no intention apparently of relieving his sons from the necessity of work, whether from an uncertainty as to the amount of his estate, or from the belief that their happiness would be better secured by requiring them to labour. The bequest of the law library to Henry was only on the condition of his pursuing the profession of the law and steadily pursuing the practice of it for three years, and the annual allowance to him of \$600 for three years, was coupled with the same condition. When the testator made provision for the education of George there is nothing to show that he intended him to have also an annual allowance beyond that, and to depend on a discretion he could not have expected to be wisely exercised during his minority. Nor do I think this conclusion affected by the provision for allotting a *pro rata* distribution between George and his sisters of what could be spared if the estate proved sufficiently productive from the investment of the proceeds of sales of real estate and the income from personal estate. The exact meaning is not very clear, but I assume he meant to apportion among them any surplus income of his estate over and above what was required for meeting the previous charges and trusts of the will, and this was to be done every two years. George's share would be *allotted* to him; but there is no direction to expend it for him; it would form a fund to accumulate for his benefit till he attained

majority; but this has nothing to do with the allowance to be made in the discretion of the trustees. The distribution *pro rata* is, I think, according to the number of persons to be benefited, not to the amount of income each had.

The claim of George that the money set apart to produce the allowance payable to him should be invested subject to his approval, is not sanctioned by any provision in the will. The power of investment is placed in the absolute discretion of the trustees, and must continue as long as the trusts of the will last.

The daughters, and I think George, are entitled to the income given to them, with a power to dispose of the principal by will. There seems no provision in default of such disposition.

A. H. F. L.

[CHANCERY DIVISION.]

THE CANADA ATLANTIC RAILWAY COMPANY V. THE CORPORATION OF THE CITY OF OTTAWA ET AL.

Municipal law—Railways—By-law granting bonus—36 Vic. c. 48, O., secs. 236, 248, 471, 474.

A by-law was introduced before the City Council of O., under 36 Vic. c. 48, O., on September 22nd, 1873, to grant a bonus of \$100,000. to aid in the construction of a certain railway, now represented by the plaintiffs, read a first time, considered in committee of the whole, reported with an amendment, and the clerk was directed to advertise it. Pursuant to such advertisement on October 16th, 1873, it was voted on by the electors, and carried. On October 20th, 1873, the returns of the election was presented to the Council, and the by-law was read a second and third time, and passed. Since, however, under s. 24a, sub-s. 3 of 36 Vic. c. 48, the by-law could only be taken into consideration by the Council after one month from the first publication in the newspaper, at a meeting of the Council, on November 5th, 1873, after the necessary time had elapsed, a motion to read the by-law a second and third time was proposed and lost. The by-law was by its terms to take effect on December 13th, 1873. On April 7th, 1874, a motion was again made and carried at a meeting of the City Council, that the by-law passed by the ratepayers, having been passed by the Council previously to the time required by law, the same should be now read a second and third time. In the minutes of the Council the by-law referred to was mentioned as having been read a first time on October 20th, 1873, whereas the by-law in question was read a first time on September 22nd, 1873. Moreover the by-law thus voted on by the Council was said to come into operation and take effect on December 30th, 1873, whereas the one voted on by the electors was to take effect on December 13th, 1873. The work on the railway to which the bonus was to be given began in August, 1872. In 1874 the contractors became insolvent, and from January, 1874, to February, 1881, no work was done, on which last date a new contract was made by the plaintiffs, under which the road was completed in September, 1882, and in November, 1882, a demand was made on the defendants, the city of O., for the debentures and refused. The plaintiffs now brought this action to enforce the by-law and the delivery to them of the debentures.

Held, that the by law was bad, inasmuch as it was not in conformity with the provisions of 36 Vic. c. 48, s. 248.

Held, also, that suba. 4 of s. 471 of 36 Vic. c. 48, must not be construed as authorizing aid only to such railways as are mentioned in sub-s. 1 of that section.

Quere, whether s. 236 of the statute does not require the by-law to be passed by the Council submitting the same.

THIS was an action brought by the Canada Atlantic Railway Company against the Corporation of the city of Ottawa and the mayor and treasurer of the said city for the time being, claiming a declaration that they, the plaintiffs, were entitled, on due performance by them of all

conditions precedent, to the benefits and advantages granted to them by a certain by-law of the city of Ottawa, and that the said by-law was valid, operative, and binding on the defendants, the corporation of the said city ; a declaration that they, the plaintiffs, out of the \$100,000 of debentures in the said by-law mentioned were entitled to the issue and delivery to them forthwith of \$6,000 of the said debentures, and of \$75,000 of the said debentures; a mandamus or a mandatory injunction against the defendants commanding them to issue and deliver forthwith to the plaintiffs the said \$6,000 and \$75,000 of debentures, and to do all matters and things, and to pass all necessary resolutions and by-laws to validate and give effect to the said by-law submitted to and approved of by the electors of the said city of Ottawa, and to specifically perform the said by-law ; \$10,000 damages for the non-delivery of the said debentures when demanded as aforesaid, general relief and costs of suit.

The facts of the case are fully set out in the judgment and footnotes appended thereto.

The case was heard on September 11th, 1883, at Ottawa, before Proudfoot, J.

Dalton McCarthy, Q. C., Gormully and O'Gara, for the plaintiffs, referred to *Michie v. The Corporation of the City of Toronto*, 11 C. P. 379 ; *re Grand Junction R. W. Co. v. The County of Peterborough*, 6 A. R. 339, 8 S. C. 76 ; *State of Minnesota v. Supervisors of the Town of Lime*, 23 Minn. 521 ; *State of Minnesota v. City of Hastings*, 24 Minn. 78.

J. Bethune, Q. C., and MacTavish, for the defendants, referred to *Luther v. Wood*, 19 Gr. 348 ; *Kirk v. Nowill*, 1 T. R. 118 ; *Lumley on By-laws*, p. 196-8 ; *re North Simcoe R. W. Co. v. The City of Toronto*, 36 U. C. R. 101 ; *Young v. Corporation of Leamington*, 8 Q. B. D. 579, 8 App. Cas. 517 ; *Britain v. Rossiter*, 11 Q. B. D. 123 ; *Dow v. Black*, 6 P. C. 272 ; *Dobie v. Temporalities Board*, 7 App. Cas. 136 ; *Clearwater v. Meredith*, 1 Wall. 25 ; *Marsh v. Fulton County*, 10 Wall. 676 ; *Skerrard v. Lafayette County*, 3

Dill. C. C. 236; *Harshman v. Bates County*, 3 ib. 150; *Dillon* on Mun. Corp., 2nd ed., sec. 415; *Chambers County v. Clews*, 21 Wall. 317; *North London R. W. Co. v. Great Northern R. W. Co.*, 11 Q. B. D. 30; *Potts v. Corporation of Dunnville*, 38 U. C. R. 96.

Dalton McCarthy, Q.C., in reply, cited *re Canada Atlantic R. W. Co. and The Corporation of the Township of Cambridge*, 3 O. R. 291; O. J. A. sec. 17, subs. 8; *re Langdon and the Arthur Junction R. W. Co.*, 45 U. C. R. 47; *Paffard and the Corporation of the County of Lincoln v. Lincoln*, 24 U. C. R. 16; *re Sells and the Village of St. Thomas*, 3 C. P. 286; *Grierson v. The County of Ontario*, 9 U. C. R. 623; *Sutherland v. The Township of East Missouri*, 10 U. C. R. 626; *Boulton and The Town Council of the Town of Peterborough*, 16 U. C. R. 381; *Pierce on Railroads*, pp. 68, 100-1; *Secord v. The Corporation of the County of Lincoln*, 24 U. C. R. 141; *In re Lloyd and the Corporation of the Township of Elderslie*, 44 U. C. R. 235; *Gibson v. The Corporation of the United Counties of Huron and Bruce*, 20 U. C. R. 111; *Cameron v. The Municipality of East Missouri*, 13 U. C. R. 190; *County of Scotland v. Thomas*, 94 U. S. R. 682; *State of Missouri v. Greene County*. 34 Mo. 540. (a)

January 9th, 1884. PROUDFOOT, J.—Action to enforce a bonus granted by the defendants for the construction of the Montreal and City of Ottawa Junction Railway Company.

The facts appear to be these: The Montreal and City of Ottawa Junction Railway Company was incorporated in 1871 by an Act of the Parliament of Canada, 34 Vic. c. 47, with the powers and privileges of the Railway Act of 1868, and authorized to receive aid from municipal corporations as gifts or by way of bonuses towards constructing the railway. The railway was to be commenced

(a) It has been thought of use to give the names of the cases cited by counsel in this case although for the most part they do not relate to the point on which the decision turned.

within three years and completed within eight years after the passing of the Act. The railway was to run from the city of Ottawa to Alexandria and thence to Coteau Landing. In 1878, just before the expiration of the eight years, the 41 Vic., c. 28, D. extended the time for completing the railway for six years. In 1872, the Coteau and Province Line Railway was incorporated by 35 Vic., c. 83, to construct a railway from at or near Coteau Landing, crossing the River St. Lawrence by a railway bridge, and thence to some point on the northern boundary line of the State of New York or in the Town of St. John's. The Coteau and Province Line Railway Company, and the Montreal and City of Ottawa Junction Railway Company were amalgamated in 1879 by 42 Vic., c. 57, D., under the corporate name of the Canada Atlantic Railway Company, the present plaintiffs, which confirmed an agreement for that purpose entered into by the companies. The agreement, among other things, specified among the assets of the Montreal Company a bonus from the city of Ottawa of \$100,000. In 1873, the Montreal Company applied to the city of Ottawa for aid to construct the road, and on the 5th September, 1873, at a meeting of the Council a resolution was passed authorizing the by-law committee to introduce, at the next regular meeting of the Council, a by-law for granting a bonus of \$100,000 of debentures, bearing interest at 6 per cent, to aid in the construction of the road and of machine shops to be erected in the city, or within a mile of it. A by-law was accordingly introduced on the 22nd of September, 1873, read a first time, considered in committee of the whole, and reported with an amendment. The clerk was directed to advertise it, pursuant to the statute, and the election (votes of the electors) to take place on the 16th of October. The original by-law introduced to the Council has gone astray, but it seems to have appointed a time for voting, named returning officers and polling places, which are all omitted in the copy of the by-law said to have been finally passed. The by-law was advertised on the

24th of September, 1873, and voted on by the electors on the 16th of October, and carried. The returns of the election were presented to the Council on the 20th of October, and the by-law was read a second and third time, and carried.

This passing of the by-law by the Council was contrary to the statute, as by 36 Vic., cap. 48, O. s. 231, sub-s. 3 it could only be taken into consideration by the council after one month from the first publication in the newspapers. At a meeting of the Council, on the 5th of November, after the necessary time had elapsed, a motion to read the by-law a second and third time was lost by a vote of seven to three. The by-law was, by its terms, to take effect on the 13th of December, 1873. The usual election of town councillors took place in January 1874. At a meeting of the Council, on the 7th of April, 1874, a motion was made and carried, that the by-law passed by the ratepayers having been passed by the Council previous to the time required by law, the same be now read a second and third time. In the minutes of the Council, this by-law is said to have been read a first time, on the 28th of October. If the reference is to the by-law in question this is a mistake. It was read a first time on the 22nd of September. The original by-law thus voted upon must, I think, upon the evidence, be taken to have been sealed by the corporate seal and signed by the Mayor. It is said, however, that it was to come into operation, and take effect on the 30th day of December, 1873. The one voted on by the electors was to take effect on the 13th day of December, 1873. The work upon the Montreal and City of Ottawa Junction Railway began in August, 1872, and continued until January, 1874, when the contractors failed, went into insolvency, and got their discharge in August, 1874. From January, 1874, till February, 1881, no work was done. In February, 1881, a new contract was made by the plaintiffs, under which the road was completed in September, 1882, and on the 8th of November a demand was made for the debentures and refused. The minutes of the Council of several meetings on the 10th of April, 21st of April, and 15th of

of December, 1879, were put in, showing that the Council were taking an interest in the construction of the bridge at the Coteau, over the St. Lawrence: but as they do not show that this was in any way connected with the bonus, and was just such as might have been manifested by any person or body corporate, I do not think them of any importance on the question before me. On the 13th of June, 1879, a motion was made and carried, "That when the City of Ottawa voted \$100,000 to the Montreal, Ottawa, and Coteau Railway, it was distinctly understood that the Townships of Cambridge and Russell were to aid the road by bonuses also, and we observe by the press that the above named Townships have not yet fulfilled their promises; be it therefore resolved, that his worship the Mayor be and he is hereby instructed to communicate with the reeves of the Townships aboved named, urging their immediate action in this matter, as it is important that united action be put forth to secure the construction of the road."

In pursuance of this resolution, the Mayor, on the following day, wrote to the reeves of these townships, referring to the city of Ottawa having voted \$100,000 to the Montreal and City of Ottawa Junction Railway Company, upon the distinct assurance that these Townships would assist the enterprise in a liberal manner, and urging them to grant bonuses.

The Mayor presented this letter to the Council on the 16th of June, 1879, when, upon motion, it was received and placed on the file. On the 14th of July, 1881, a resolution was passed by the Council, appointing the Mayor, Mr. McIntosh, as one of the directors of the plaintiffs' company, for the year 1881, with a proviso that nothing therein contained should be held to alter the legal liability of the corporation of the city of Ottawa, with reference to the by-law No. 346, of the said corporation, entitled, "By-law to grant a bonus of \$100,000 to the Montreal and City of Ottawa Junction Railway Company."

Alderman Lauzon, who moved that resolution, was examined as a witness, and said that it was passed on the application of the plaintiffs, to prevent the road getting into the hands of the Grand Trunk Railway Company. He objected to the application, as it might place the city in a false position as to the bonus, but finally the non-committal resolution was passed. The Mayor was sent to prevent the road getting into the hands of the Grand Trunk, not to protect the city. Under that resolution, the Mayor seems to have attended meetings of the directors of the railway on February 15th, February 25th, May 21st, May 31st, September 6th, and October 18th, 1881.

The proceedings for granting this bonus were taken under the 36 Vic., ch. 48, sec. 471, 474, which authorized city municipalities to grant bonuses to any railway company in aid of such railway, and to issue debentures for payment of the same (sec. 471, sub-sec. 4). It was said that the railways to which aid might be granted in that way were only those mentioned in sub-sec. 1, which must mean only provincial railways, but I do not think that sub-sec. 4 is so limited. The object of the two provisions was different: one was for the subscription of shares in the capital stock of the railway company, for lending to or guaranteeing the payment of any sum of money borrowed by the railway company; the other was for granting a bonus. In the one case, it might be of great importance that the railway company, for which a guarantee had been given, or in which stock had been taken, should be under Provincial control, while in the other, the municipality was making a gift or granting a bonus, upon payment of which they would incur no liability. A by-law, however, granting a bonus to be raised by the issue of debentures, not payable in the same municipal year, must comply with the formalities required by sec 248: *Billings v. The Municipal Council of the Township of Gloucester*, 10 U. C. R. 273, Harr. Mun. Man., 4th ed. p 571. Some of these are, that the by-law, if not for creating

a debt for the purchase of public works, shall name a day in the financial year in which the same is passed, when the by-law shall take effect, and the whole of the debt and the obligations to be issued therefore shall be made payable in 20 years at furthest from the day on which such by-law takes effect. In both these respects this by-law offends, for it is claimed to have been passed on the 7th of April, 1874, while it purports to take effect on the 30th of December, 1873. The financial and the secular year are the same, 36 Vic. c. 48, secs. 258-261. Again the by-law submitted to the vote of the electors was to come into force on the 13th of December, and if we assume that the Council in 1874 intended to pass that by-law and made the debentures payable on the 29th of December, 1893, that was more than twenty years from the day of the by-law taking effect. (See sec. 474.) But the by-law submitted to the people was itself erroneous in this respect, for it provided for the by-law coming into force on the 13th of December, and made the debentures payable on the 29th of December, 1893.

The 36 Vic. ch. 48, sec. 236, was strongly insisted on, which provides that any by-law which shall be carried by a majority of the electors voting thereon, shall within six weeks thereafter be passed by the Council which submitted the same. The Council could not be compelled to do a nugatory act. The voters had no right to approve of a by-law at variance with the provisions of the statute, and the action of the Council in passing it would be ineffectual to confer any right. It was also contended that sec. 236 required the by-law to be passed by the Council that submitted the same *i. e.* the Council for 1873. There are many reasons in favour of such a construction, but I do not think it necessary to express any opinion upon that point at present. The original by-law submitted to the people is not forthcoming, and as in my opinion the case depends upon its terms, I refer to the evidence as to its contents. W. P. Lett was clerk of the City of Ottawa in 1873, and was examined. He did not speak of the contents of the by-law submitted to

the people from recollection, but he produced a slip from the *Free Press* containing the print upon which the voting took place, and the 5th section is perfectly distinct that it is to come into force on the 13th of December, 1873. It would be easy to speculate upon the ease with which 13th might have slipped in by mistake for the 30th, but it is not said that there was any mistake, and even if there had been, the mistake was voted on, and there is no authority in any Court to say that a by-law approved by the people to come into force on the 13th is not to come into force till the 30th. The people were under no mistake, and unless there was a common mistake how could it be changed?

There is much in the circumstances of the case to justify the course of the defendants in resisting this claim. Although they did not insert any limit of time in the by-law, within which the work was to be completed, it is plain they thought it was to be prosecuted immediately. The work was begun in 1872, and was continued till January, 1874, after the vote on the by-law had been taken. But when the contractors became insolvent and no work was done on the road for more than seven years, the city might well consider that no serious intention was entertained of going on with the work, and indeed they took no steps to levy a rate for the sinking fund. If debentures were now to be issued as of the date of the by-law, the amount of taxes required to be levied would compel a violation of the statute for the consolidation of the city debt, 41 Vic. ch. 37, which limited the rates to be levied to $1\frac{1}{2}$ cents on the dollar, and the debentures could not be issued to run twenty years from the present date. During these seven years the circumstances of the city in regard to railways had altered. In 1873, there was no railway between Ottawa and Montreal, but in 1878, the Occidental Railway reached Hull just across the Ottawa River from the city, and in 1881 it was brought into the city. What was of vital importance to the city in 1873, had ceased to be so in 1881. In the year 1879, indeed, the council seem to have been

desirous of getting the Townships of Cambridge and Russell to grant bonuses to the Montreal and City of Ottawa Railway Company, but there was nothing then done by the Council to incur a liability if not already incurred under the by-law of 1874.

A resolution of the Council was referred, to passed March 21st, 1881, asking the plaintiffs' company to commence the construction of the Ottawa end of the road that spring, in the interest of the working classes of the city, but there is no recognition of any liability in the city, for anything in that resolution.

Another resolution was passed by the council on the 21st of November, 1881, requesting the Mayor and finance committee to take immediate action on the by-law passed October 20th, 1872, and if there are no legal objections to have the debentures prepared and handed over. The finance committee consulted the solicitor of the city upon the application of the plaintiffs for the issue of the bonds, and on the 5th of December, 1881, reported that they were advised that they could not be issued without further legislation.

Many other objections were urged against the liability of the defendants, and questions of considerable importance raised, not only as to the contents of the by-law, but of more general importance, which in the view I take of the case need not be further discussed. I think the by-law voted on by the people was bad as not in conformity with the powers conferred by the legislature: that I cannot direct the issue and delivery of bonds under it; that nothing has been done by the defendants since, that can have the effect of rendering valid this by-law, and that no new by-law has received the sanction of the rate payers for this purpose. The action is therefore dismissed with costs. I have not overlooked Mr. McCarthy's argument that the by-law not having been moved against within a year cannot now be resisted; but that rule at all events does not apply where the invalidity is apparent on the face of the by-law, as in this case: *Vandecur v. The Cor-*

poration of East Oxford, 3 A. R. 131; *Harding v. The Corporation of the Township of Cardiff*, 2 O. R. 329; *Harr. Mun. Man.*, 4th ed., p. 245.

This case was carried, by way of appeal, before the Divisional Court, and on June 27th, 1884, judgment was given affirming the above decision. (*vide* 8 O. R. 201.) The case now stands for argument before the Court of Appeal.

A. H. F. L.

[CHANCERY DIVISION.]

JOHNSON V. KRÆMER.

Will—Construction—Power of sale—Adverse possession of executor—Statute of Limitations—Express trust—R. S. O. ch. 108.

J. by his will devised to H., his wife, all his real estate in L. "during her natural life, for the use and support of herself and family, and in case H. should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent, and the proceeds thereof to be distributed as follows," &c.: "But if H. should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs or assigns, after the death of H., share and share alike." He then nominated P. executor of his will, "with full power and authority to act in the same." J. died in 1838, leaving H. and three children him surviving. P. took out probate. In 1846, H. by deed conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which he retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.'s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.'s will.

Held, affirming the decision of OSLER, J. A., that P. could not be said to have been an express trustee within R. S. O. ch. 108, sec. 30, and, that being so, the plaintiff's action was barred by the Statute of Limitations. The proper construction to be placed on the will was, that a life estate was given to H. with a power of sale to P. during her life time with her consent, and the remainder in fee to the children in the event of non-execution of the power: that unless and until the consent of the widow was given, the power of sale did not exist, and the executor had no duty to perform in relation to the lands; and he did not take, nor was it necessary for him to take, the legal estate; that as he never was required to execute the power, he never became trustee.

THIS was an action brought by Alexander Johnson as plaintiff, against the executors and trustees of the will of

25—VOL. VIII O.R.

William Purdy, deceased, and the children and grandchildren of Charles Johnson, being his heirs and heiresses-at-law other than the plaintiff himself who was one of the heirs of the said Charles Johnson, claiming certain lands of their ancestor reduced into possession by the said William Purdy, his executor, and by Purdy devised in trust to Kræmer and Karle, who were his executors above mentioned. The plaintiff claimed that the defendants Kræmer and Karle should be ordered to pay the past rents and profits into Court to be distributed among the parties entitled thereto; a sale of the said lands by the Court, and a distribution of the proceeds; and for further relief.

The facts of the case appear from the judgment of Osler, J. A.

The action first came up for trial at St. Catharines, on April 23rd, 1884, before Osler, J. A., when the plaintiff's case was in part heard, and the trial was adjourned. It was resumed at Toronto on May 17th, 1884.

B. B. Osler, Q. C., for the plaintiff.

W. Cassels, Q. C., for the defendants, the executors of William Purdy.

May 29th, 1884. OSLER, J. A.—Charles Johnson, the father of the plaintiff by his will dated the 12th of January, 1836, devised as follows: "First I order all my just debts and funeral expenses to be paid out of my estate. Item, I give and devise to my beloved wife Hannah Johnson, * * all my real estate in the township of Louth, being part of lot 14 in the 3rd concession of the said township, * * during her natural life, for the use and support of herself and family, and in case my said wife should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same, with her consent, to the best advantage, and the proceeds thereof to be distributed as follows: one-third to be given to my said wife for her use and support, one-third to be appropriated in educating and bringing up my children,

and one-third to be laid out in wild lands to be equally divided amongst my children. But if my said wife should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs or assigns, after the death of my said wife, *share and share alike*. And lastly, I do hereby nominate and appoint my trusty friends William Purdy and David Price executors to this my last will, with full power and authority to act in the same."

The testator died about the 12th of December, 1838, and left surviving him his widow Hannah Johnson, and three children, of whom the plaintiff is the eldest.

Probate of the will was granted to William Purdy, one of the executors named therein, on March 25th, 1839.

Shortly after the death of the testator, his widow and children removed to the State of Illinois, and never returned to Canada.

By deed bearing date February 7th, 1846, Hannah Johnson, by her attorney (a), Wm. Johnson, in considera-

(a.) The Power of Attorney was as follows :

Know all men by these presents that I, Hannah Johnson, of, &c., for divers good causes and considerations me hereunto especially moving, have made, constituted, and appointed William Johnson, of, &c., my true and lawful attorney for me and in my name to enter into and take possession of all and singular that certain parcel or tract of land, (describing it.) And also for me and in my name to make sale of and convey all or any of the said premises, and to sign receipts for the purchase money, and to sign, seal, and execute, and as my act and deed, acts and deeds, deliver good, sufficient, and valid deeds or deed of conveyance, and assurance for conveying the said premises or any part thereof to William Purdy, of, &c., Yeoman, his heirs and assigns. And also, for me and in my name to commence and prosecute any action or actions, suit or suits, as well real as personal and mixed or otherwise, in any court of law or equity in the said province, in relation to the said premises, and the same to prosecute and follow or to discontinue, or become non-suit therein, as my said attorney shall see cause, and generally for me and in my name to do, perform, and execute all and whatever shall be requisite and necessary to be done in and about the premises as fully and effectually to all intents and purposes as I might or would do if personally present, hereby promising to ratify and confirm all and whatever my said attorney shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, &c.

tion of £150, purported to convey the land in question to Wm. Purdy, the executor. There would seem to be no words of grant sufficient to pass an estate, those employed being "remise, release, relinquish, and quit claim :" *Acre v. Livingstone*, 26 U. C. R. 282; *Livingstone v. Acre*, 15 Gr. 610; *Bright v. McMurray*, 1 O. R. 172; *Spears v. Miller*, 32 C. P. 660.

The *habendum* to Wm. Purdy, his heirs and assigns, is not absolutely inappropriate to the conveyance of an estate *pur autre vie* if Hannah Johnson took an estate for life under the will of her husband, and intended to convey such an estate to Purdy.

I have no evidence before me of the circumstances connected with the sale, or whether the price was a fair price for the fee simple of the land looking at its condition and value at the time. Looking at the will, the power of attorney, and the deed, it is not improbable that the parties supposed that the widow was in a position to dispose of the fee, though it is clear enough upon the former that she did not upon any construction of the will take a greater estate than an estate for life, and that was all that she could or did convey.

Under the deed Purdy obtained and remained in possession of the land until his death on the 30th of March, 1882. He devised it to the defendants Kraemer and Karle in trust for the purposes of his will.

Hannah Johnson died on the 22nd of November, 1872, and this action was brought on the 6th of November, 1883.

It is conceded that the title of the plaintiff and of the defendants in the same interest is barred by the Statute of Limitations, R. S. O., ch. 108, unless Purdy can be treated as an express trustee under the 30th section, as the statute would otherwise have begun to run in his favour on the widow's death in November, 1872, there being no question of the existence of any tenancy at will after that date.

The 30th section is confined to cases of express trusts, that is to cases where the real property is vested in trustees upon a trust either declared by the deed, will, or other

written instrument, or else stated in such language that by the rules of construction put on that language by Courts or Equity the legal estate is vested in trustees, and the beneficial estate or interest in another: *Darby & Bos.*, on the Statute of Limitations, p. 337 ; *Hunt v. Bateman*, 10 Ir. Eq. 360.

In *Dickenson v. Teasdale*, 1 De G. J. & Sm. 52, Lord Westbury said, at page 59: To create an express trust within the meaning of the statute "there must be a trustee with an express trust, and an estate or interest in lands vested in the trustee, and which, therefore, the trust must affect."

It was urged that the direction for payment of the testator's debts out of the estate, had the effect of making the executor an express trustee. That, however, amounts merely to a charge, not vesting the legal estate in the executors : 8 Vin. Abr. 262 ; and is not like an express devise or appropriation of lands in trust for payment of debts. In the latter case there is an express trust ; in the former there is not, although the executor may take a power of sale by implication: *Grummet v. Grummet*, 14 Gr. 648 ; *Henry v. Simpson*, 19 Gr. 522.

It was also suggested that the direction that the estate, if not sold during the widow's lifetime, should be divided amongst the "children, their heirs or assigns," and the clause which confers upon the executors of the will "full power and authority to act in the same," read together shew the testator's intention was that the executors should make the division, and should take the legal estate to enable them to do so. I do not think these clauses by themselves would admit of that construction, for, in the absence of language shewing that a sale would be necessary for the purpose of making a division, the former would be satisfied by treating it as a devise to the children as tenants in common in fee, and the latter would have no peculiar significance: *Henry v. Simpson*, 19 Gr. 522. These clauses impose no duties upon the executors which require the legal estate to be vested in them to enable them to carry

them out, and, taken alone, the former imposes no duty upon them at all, differing in that respect from the will in question in *Davies to Jones & Evans*, 24 Ch. D. 190, where the executors were directed not merely to distribute among the testator's daughters, after their mother's death, the property which had been devised to her for her life, but also to invest the shares of two of them.

In *Doe d. Rees v. Williams*, 2 M. & W. 749, the will contained a direction that the residue of the personal and real property of the testator was to be equally divided between her two grand-nieces, which was the same, in effect, as a direction to the trustees to convey. There was an express devise to the trustees for certain purposes; and the point decided was that the legal estate did not go over to the grand-nieces merely upon the execution of those purposes, but remained in the trustees until conveyed by them.

I think the proper construction to be placed on this will is, that a life estate was given to the testator's widow, with a power of sale to the executors during her lifetime with her consent, and the remainder in fee to the children on her death in the event of the non-execution of the power. Unless and until the consent of the widow was given, the power of sale did not exist, and the executor had no duty to perform in relation to the land, and he did not take, nor was it necessary that he should take the legal estate. As he never was required to execute the power, it seems to me that he never became trustee, and that the plaintiff's title is barred by the statute.

I, therefore, dismiss the action. The plaintiff must pay the costs of the infant defendants. I make no order as to the costs of the other defendants. If there is no other fund out of which they can re-imburse themselves they must do so from the property which their testator has thus acquired, and has devised to them.

Afterwards the plaintiff moved by way of appeal to the Divisional Court.

The motion was made on September 6th, 1884, before Boyd, C., and Proudfoot and Ferguson, JJ.

B. B. Osler, Q. C., and T. S. Plumb, for the plaintiff. There was an express trust created by the will the moment the widow signified her desire that the land should be sold: *Lewin* on Trusts, 7th ed., p. 748-750; *Ib.*, p. 194-196. The executor became trustee to sell as soon as the widow expressed her desire to sell by the power of attorney. It is not necessary to see what the deed was in effect, but what it was intended to be. The deed by its terms shews the widow intended to sell more than her life estate: *Darby & Bos.* on Lim., p. 349-350; *Sturgis v. Morse*, 24 Beav. 541; *Gibbs v. Guild*, 9 Q. B. D. 591. If there was not an express trust, but the executor merely entered adversely in 1872, then there was a concealed fraud within the 31st sec. of the Real Property Limitation Act, R. S. O. ch. 108. The plaintiff knew nothing of his rights till 1883. The evidence shows that the executor was the only person aware of them, and knew the plaintiff's address. The plaintiff was living in a foreign country, and the widow had never told her children of their past history.

W. Cassels, Q. C. The point of concealed fraud was not argued in the Court below. If there was no express trust there could be no concealed fraud. The power of attorney shows that she was only selling to Purdy the executor her life estate, and she was to get the whole of the purchase money for that estate. There was no express trust. The cases are nearly all referred to in the judgment appealed from: see, also, *Perry* on Trusts, 2nd ed., sec. 865; *Watson's Compendium of Equity*, vol. 1, p. 528.

Plumb in reply, referred to *Bright v. McMurray*, 1 O. R. 172; *Spears v. Miller*, 32 C. P. 660; *Saylor v. Cooper*, 8 A. R. 707.

September 8th, 1884. PROUDFOOT, J.—I think the judgment of Osler, J. A., should be affirmed.

The power of attorney from Mrs. Johnson only authorized a sale of her interest in the estate, and contains no indication of an intention that the whole estate should be sold to carry the trusts into effect. The express trust, therefore, never arose.

The possession that Purdy took was therefore of the life estate of Mrs. Johnson, and so long as she lived the statute would not run against the remaindermen.

But more than ten years have elapsed since her death, during which Purdy or his representatives have been in possession.

There is no devise of the estate to the trustees. The implied estate to enable them to fulfil the trust would only arise when the trust did. Meantime the legal estate would descend to the heir; and as the trust never arose the trustees never had any estate under the will.

The exception as to concealed fraud does not arise. To take the case out of the statute, it must be the concealment of something that would have prevented the operation of the statute. But a constructive trust would not have prevented the operation of the statute; *ergo, &c.*

But I do not think there was even a constructive trust, for the conveyance of the widow could have no *tortious* operation; nothing passed but her interest.

BOYD, C. and FERGUSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

CANADA ATLANTIC RAILWAY CO., V. THE CORPORATION OF
THE CITY OF OTTAWA ET AL.

Bonus—By-law—Irregularities—Formalities—Time within which bonus is payable—Municipal Act.

The Montreal and City of Ottawa Junction R. W. Co. were incorporated in 1871 under an Act which provided that they should commence their road within three years and finish it within eight years. They commenced work in 1872, and while it was going on applied to the defendants for a bonus. The by-law granting the bonus was introduced to the council on September, 22nd, 1872, and read a first time, the clerk was instructed to advertise it, and the votes of the electors were to be taken October 16th. The by-law as read for the first time had the date that it was to take effect on inserted as December 30th. The by-law as published and voted on by the electors had the date December 13th, (supposed to be an error of the printer.) The vote was taken October 16th, and the return thereof made to the council on October 20th, when the by-law was read the second and third time and passed. This passing of the by-law was discovered to be premature, as one month had not elapsed from its first publication, as required by 36 Vic. c. 48, sec. 231, sub-sec. 3. On November 5th, when sufficient time had elapsed, a motion to read the by-law a second and third time was lost by a vote of seven to three. At a meeting of the council of the following year on April 7th, 1874, a motion was carried that the by-law be read a second and third time. Work was at that time being done on the road, and continued until January, 1874, when the contractors failed and the work stopped. Nothing was done under the by-law, and no further work was done until February, 1881. The M. & C. of O. J. R. W. Co. was amalgamated with the C. & P. L. E. R. W. Co., under the name of the plaintiffs, by 42 Vic. ch. 57, D.

In an action by the plaintiffs to recover the benefit of the bonus, it was Held, on appeal from the judgment of PROUDFOOT J., ante p. 185, dismissing such action. :

1. That an Ontario municipality has power to grant a bonus to a railway company incorporated under a Dominion Act.
2. That an objection to a by-law that it was passed a few days less than a month after its first publication is not fatal, if it was passed after it was assented to by the electors.
3. That the omission (in the by-law as finally passed) of the clauses providing for voting for the time and places at which the votes were to be taken, would not invalidate it.
4. That the words "The council which submitted the same," in sec. 236 of the Municipal Act of 1873, do not mean the council of the particular year, but the council of the same municipality.
5. That the by-law should have complied with the terms of sec. 248, and as it showed on its face that it was to take effect on December 13th, and the debentures to be issued under it were to be payable on December 29th, 1893; they were not payable within twenty years from the date of its taking effect; but if the council had corrected this error from the 13th to the 30th on the final passing, the Court would not interfere to quash the by-law on such an objection, which really made no difference in the liability of the rate-payer.

6. That the by-law granted a bonus to a railway company which was bound by its charter to commence work within three years, and finish the road within eight years.
7. That when no time is limited in the bonus by-law, there is an implied condition that the work shall be completed or the bonus earned within the time fixed by the charter. The company could not complete its work after the time fixed by the charter without further legislative authority, and in the case of a voluntary gift, parliament in extending the time for the completion of the work, cannot be held to have continued the obligation of the defendants.

The judgment appealed from was therefore sustained.

THIS case reported ante p. 183, came on by way of appeal from the judgment of Proudfoot, J., and was heard on February 26 and 27, 1884, before Osler, J. A., and Ferguson, J.

Gormully, for the plaintiffs. This suit was brought to obtain the benefit of a bonus of \$100,000 granted by the defendants under a by-law to the Montreal and City of Ottawa Junction Railway Company, which company has been amalgamated with the Coteau and Province Line Railway Company under the name of the Canada Atlantic Railway Company. The facts are rather complicated, but are carefully collected in the judgment of the learned Judge who tried the case. In 1873, the Montreal and City of Ottawa Junction Railway Company applied to the defendants for a bonus, and it is claimed a bonus of \$100,000 was then granted to them under the by-law in question in this suit. Section 11 of the Amalgamating Act, 42 Vic. c. 57, D., provides that all the assets of both companies, including this bonus, shall become vested in the plaintiffs. One of the main questions is, the date when the by-law granting the bonus was to take effect. Was it the 13th or 30th of December? I contend the by-law was passed on October 20th, 1873, though not sealed and perfected until April 7th, 1884. A railway by-law need only comply with the clauses of the Municipal Act relating to aid to railways, and with the sections as to obtaining the consent of the electors; *Re Billings and the Municipality of Gloucester*, 10 U. C. R. 263; *Clement v. County of Wentworth*, 22 C.P. 300. The object of the provision that the by-law should be passed within

six weeks is that if the council do not pass it within that time they can be compelled to do so, and they did pass it although it was not sealed until afterwards. The defendants contend that the council who finally passed the by-law in 1874, were not the council "who submitted the same" as provided for in the statute, while the plaintiffs contend that those words mean the council of the same municipality. When the by-law was introduced, the date inserted was the 30th, and it was read in that shape. If the publication in the newspaper had the date inserted as the 18th, it must have been caused by a slip and makes no difference. It is a mere irregularity: *Re Cameron and The Municipality of East Nissouri*, 13 U. C. R. 190; *Boulton and the Town Council of the Town of Peterborough*, 16 U. C. R. 380; *Re Lloyd and the Township of Elderslie*, 44 U. C. R. 235; *Secord and the County of Lincoln*, 24 U. C. R. 147. Since the judgment was given the original by-law has been discovered, and it shews that the date was the 30th. If the by-law must mention as provided for by 36 Vict. c. 48, s. 248, ss. 1, O. a day in the financial year when it was to come into effect, the question arises when was the by-law passed. I contend that it was really passed twice, first in September, 1873, and second in April, 1874. Or, to put it in another way. If it was properly passed in October, 1873, then the sealing in April, 1874, was a mere ministerial act, and was done by the proper officers. The municipality are bound whether it is a matter of contract or a gift. I refer to *Paffard and the Corporation of the County of Lincoln*, 24 U. C. R. 16; *Luther v. Wood*, 19 Gr. 348; *Re London, Huron, and Bruce and the Council of the Corporation of the Township of East Wawanosh et al.*, 36 U. C. R. 93; *In re The Stratford, &c. v. Corporation, &c. of the County of Perth*, 38 U. C. R. 112; *State of Minnesota v. Supervisors of the Town of Lime*, 23 Minn. 521, cited in *Pierce on Railroads* (1881) note 4, at 102; *Queen v. The Churchwardens of St. Michael*. 6 E. & B. 807; *King v. Carpenter*, 6 A. & E. 794; *Haynes v. Copeland*, 18 C. P. 168.

Maclennan, Q. C., and McTavish for the defendants. The Act incorporating the Montreal and City of Ottawa Junction Railway Company, 34 Vict. c. 47, D., provided that the work was to be begun within three years, and finished within eight years; and the road was to be built between certain points. The by-law was introduced while the work was going on. The work soon afterwards was stopped and nothing done between the years 1873 and 1881, about eight years. The time under the charter had then expired. The by-law contemplated a present levy for the sinking fund, and a present commencement and continuance of the work. When the time for the levy came in 1874 the work had ceased with no prospect of continuance. The City of Ottawa Special Act, 41 Vict. c. 37 O., was passed in 1878, and limited the amount of taxation, &c., and deprived the defendants of power to provide for any such bonus. The plaintiffs' laches have taken away their right to the bonus. The by-law as published and voted on was to go into effect on December 13th, 1873, and it was not signed or sealed until April, 1874. The change of date from December 30th, 1873, as introduced in the council, to December 13th, 1873, as published and voted on, makes the by-law void on its face. The by-law passed by the people was not passed by the council in 1874, and if the council had passed the one voted on by the people it would be bad, because 36 Vict. c. 48, s. 248, sub-s. 1, O. provides that a by-law creating a debt like this, must come into force in the same year it is passed. The provision as to taking the vote should be contained in the by-law: s. 231; and the evidence shews that the by-law passed by the council did not contain it. Sec. 236 is not compulsory, and the third reading of a by-law need only take place upon the councillors' convictions as to their duties to the community. The by-law must be taken up within six weeks or it drops altogether and must be commenced *de novo*, and not being dealt with in that time and *by the same council* cannot be afterwards passed. The Courts now go much further in quashing by-laws than formerly: *In re Nichol and*

The Township of Alnwick, 41 U. C. R. 577; *In re Revell and the Corporation of the County of Oxford*, 42 U. C. R. 337; *Re Lloyd and the Township of Elderslie*, 44 U. C. R. 235; *Re Misener v. The Township of Wainfleet*, 46 U. C. R. 457; *Re North Simcoe R. W. Co. and the City of Toronto*, 36 U. C. R. 101. There was nothing to be done by the company, and as there was no consideration from them they could not enforce the by-law. The Court will not compel the council to carry out a voluntary gift: *Jefferys v. Jefferys*. 1 Cr. & Ph. 138; *Dillon v. Coppin*, 4 My. & C. 647, There is no trust on the part of the corporation: *Jordan v. Money*, 5 H. L. C. 185. The Dominion Legislature would not extend the time for the completion of the work as against the defendants, and the time within which the work was to be done should be a reasonable time, which is much less than eight years: *The County of Frontenac v. The City of Kingston*, 30 U. C. R. 584, and 32 U. C. R. 348; *Potts v. The Village of Dumble*, 38 U. C. R. 96; *Young v. Mayor, &c., of Royal Leamington Spa*, 8 App. Cas. 517. Part performance can only be advanced as an argument in land cases: *Britain v. Rossiter*, 11 Q. B. D. 123. Ontario municipalities cannot bonus Dominion railways. We also refer to *Chambers Co. v. Clews*, 21 Wallace 317; *Clearwater v. Meredith*, 1 Wallace 25; *Sherrard v. Lafayette Co.*, 3 Dillon, 236.

Gormully, in reply. The by-law as passed did contain the reference to voting. See also *Grand Junction R. W. Co. v. The County of Peterborough*, 8 S. C. 76, and *Hopkins v. Mayor of Swansea*, 4 M. & W. 640, cited at p. 120.

June 27, 1884. OSLER, J.A.—On the argument before my brother Ferguson and myself, many objections were taken to the plaintiffs' right to recover, several of which appear to be of a rather formidable character. We shall not, however, find it necessary to dispose of them all.

The first objection, and one which lies at the root of the case, is, that no municipality in Ontario has power to grant a bonus to a railway company incorporated by a Dominion

Act. There is no doubt as to the power of the company to receive a bonus, as the 4th sec. of the Act of Incorporation, 34 Vic. ch. 47, D. expressly empowers them to do so. The power of the municipality to grant it depends entirely upon the 4th sub-sec. of sec. 471 of the Municipal Act of 1873, which is the Act under which the by-law in question was submitted to the electors and passed. This section declares that the council of every city, &c., may pass by-laws:

1. For taking stock in or for lending to or guaranteeing payment of money borrowed by any incorporated railway company to which sec. 18 of 14 & 15 Vic. ch. 51 (Railway Clauses Consolidation Act), or the corresponding secs. 75 to 78 of the C. S. C. ch. 66 respecting railways are made applicable by any special Act.
2. For endorsing or guaranteeing debentures issued by the company for the amount borrowed by them.
3. For issuing debentures for sums of not less than \$20 for the like purpose, payable at such times, &c., as the council may think proper.
4. For granting bonuses to any railway company in aid of such railway, and for issuing debentures in the same manner as is in the preceding sub-section provided for raising money to meet such bonuses.
5. For directing the form of such debentures, &c., and how they are to be signed "but no municipal corporation shall subscribe for stock or incur a debt or liability for the purposes aforesaid, unless the by-law before the final passing thereof shall receive the assent of the electors *in the manner* provided by this Act."

I agree with my Brother Proudfoot, and for the reasons given by him, that the words 'any railway company' in sub-sec. 4, are not limited to the railways spoken of in sub-sec. 1, if that sub-sec. refers to provincial railways only. The sub-section in question (4) was not a part of the section as it originally stood in the Municipal Act of 1866, 29 & 30 Vic. ch. 51, sec. 349, but was added to it by 34 Vic. ch. 20, sec. 6, O., passed after the Dominion Railway Act of

1868 and other Dominion Railway Legislation, where it read thus: "The following sub-section is added to sec. 349, for granting bonuses to any railway, and to any person or persons, or company, establishing manufacturing establishments within the bounds of such municipality, and for issuing debentures," &c. The latter part of this added section formed a separate section in a different position in the Municipal Act of 1873.

I think there is nothing in the language of the sub-section, its object, its origin, or its relation to other parts of the section which requires us to give it a narrower construction.

The next question is, whether any valid by-law has been passed under which the debentures sought to be recovered in this action can be issued.

I think it is established by the evidence given at the trial, and the affidavit filed on the rehearing, that the by-law as introduced and read a first time in council on the 22nd September, 1873, was intended and expressed to take effect on the 30th December, 1873, the debentures to be issued thereunder being made payable on the 29th December, 1893, and therefore just within a period of 20 years from the former day. This by-law so introduced and read a first and second time, was sent to the office of the newspaper to be published in accordance with the requirements of the Municipal Act, and unfortunately by an error of the printer the date mentioned in the copies published, as that in which the by-law was to take effect, was the 13th December, 1873, so that the debentures would appear to be payable more than 20 years after the day on which the by-law was to take effect.

The first publication was on the 24th September and the notice at the foot stated it to be a true copy of a by-law which would be taken into consideration by the council after one month from that date.

It was voted on by the electors, and carried by a majority of 265, on the 16th of October, 1873.

At a meeting of the council, held on the 20th of October, as appears from the printed minutes, "the returns of the election on the by-law having been presented," it was again "introduced," and read a second and third time and passed. The by-law thus passed was not signed by the mayor, or sealed, as it was discovered that the action of the council had been premature, a month not having elapsed from the date of the first publication.

At the next meeting of the council, held on the 5th of November, a motion to read the by-law a second and third time, and that the by-law, as so passed, should be signed and sealed by the mayor, was lost on a division.

Nothing further was done until the following year, when, at a meeting of the council held on the 7th of April, a motion was carried, that whereas the by-law granting \$100,000 to the Montreal, &c., Railway, passed by the ratepayers of this city, having been passed by this council previous to the time required by law the same be now read, &c., and passed, suspending all rules of this council to the contrary.

It was said that the by-law then passed was signed and sealed, and a copy of it was produced. The time therein mentioned for it to take effect, &c., is the 30th of December, 1873.

The clauses which appeared in the published copy providing for the time and place of voting, &c., are not in the copy referred to. The original by-law could not be found, and I think the proper inference, from the evidence, is, that they formed no part of it. The by-law has never been acted upon in any way.

To this piece of municipal legislation it is objected :

1. That the by-law, as actually passed on April 7th, 1884, is not the by-law which was published, voted on, and carried by the electors, because (a) the time fixed thereby for its taking effect is different from that named in the latter ; and, (b) because it omits that part which relates to the voting, &c.

2. There is no existing by-law passed on October 20th. If there is, it is open to the further exception that it was passed prematurely, having been passed less than one month from the first publication.

3. The by-law, as submitted to the people and voted on, is bad on its face, because the debentures to be issued thereunder are made payable at a time more than twenty years from the day on which it was to take effect.

4. The by-law passed on April 7th, 1884, takes effect in a financial year other than that in which it was passed, and it was not passed 'by the council which submitted the same.'

I have already referred to section 471. The other sections which require to be noticed are, section 231, which provides for the mode of ascertaining the assent of the electors. "The following proceedings shall be taken for ascertaining such assent:

Sub-sec. 1. "The council shall, by the by-law, fix the day, hour, and place of voting."

Sub-sec. 2 requires that a copy of the by-law shall be published in a certain manner.

Sub-sec. 3. "Appended to each copy so published and posted shall be a notice signed by the clerk of the council stating that it is a true copy of a proposed by-law which will be taken into consideration by the council after one month from the first publication in the newspaper, * * and that at the hour, day, and place * * fixed for taking the votes, the polls will be held."

Section 286, "Any by-law which shall be carried by a majority of the duly qualified electors voting thereon, shall within six weeks thereafter be passed by the council which submitted the same"

Section 248 enacts that "Every council may, under the formalities required by law, pass by-laws for contracting debts by borrowing money or otherwise, * * for any purpose within the jurisdiction of the council, but no such by-law shall be valid which is not in accordance within certain restrictions and provisions, two only of which need be referred to. Sub-section (1), "The by-law * * shall

name a day in the financial year in which the same is passed when the by-law shall take effect;" sub-section 2, "The whole of the debt and obligations to be issued therefor shall be made payable in 20 years at furthest from the day on which the by-law takes effect."

If the by-law in question can be treated as having been passed on the 20th October, I am of opinion that it is not a fatal objection to it, at all events in an action like the present, that it was passed a few days less than a month after the first publication, so long as it was passed after it had been assented to by the rate payers. It has not been argued that too early a day was fixed for the voting. Such day is not to be less than three, nor more than five weeks after the first publication (sec. 231 sub-sec. 1) so that it may take place on the last day of the fifth week, or as in this case on the first day of the fourth week.

The day on which the council will take the by-law into consideration is not required to be stated. All that is said is that they will do so after one month from the first publication. There are no negative words in the clause, and the reference to the month appears to me rather to indicate a time before which the by-law cannot be considered, if the day for voting happens to be fixed, as it may be, a month or more after the first publication. Possibly, too, the framer of the clause was under the impression that the voting could not take place until the expiration of a month from the first publication, though that is not consistent with subsection 1. Whatever force there might have been in the objection formerly, when it was certainly in the discretion of the council to refuse to pass the by-law, even though it had received the assent of the electors, I think the inference from the 236th section (even if that section be not construed as obligatory), is that the council may pass it immediately after it has been legally voted on and carried, as it requires that they shall pass it within six weeks thereafter.

I am also of opinion that the by-law would not be invalidated by the omission of the clauses which the pub-

lished copy contained, providing for the time and place at which the sense of the electors should be taken. They are part of the proceedings for ascertaining the assent of the electors, but form really no part of the by-law voted on. I think they ought not to have been omitted, as they are to some extent a voucher of the regularity of the proceedings to persons who may become purchasers of debentures or otherwise interested in the by-law. But the case seems not distinguishable on this point from *Boulton and The Town of Peterborough*, 16 U. C. R. 380, where, on a motion to quash the by-law, a similar objection arising on the Act of 14 & 15 Vict. ch. 51, was overruled. Sir John Robinson, C. J., said, p. 386: "The clause of the statute does literally provide that the manner of ascertaining the assent of the electors shall be determined by the by-law. But that must receive a reasonable construction. The proposed by-law could not be an actual by-law till after the consent of the ratepayers had been obtained, and it was therefore incorrect to require that the manner of ascertaining such consent must be determined by the by-law. When the by-law came afterwards to be passed, all that operation would be over." See also *Paffard and the County of Lincoln*, 24 U. C. R. 21, per Draper, C. J.

If the council were otherwise in a position to pass it I regard what took place on the 20th October, 1873, as a passing of the by-law within the meaning of secs. 231 and 236. All that remained to be done to complete it was to perform 'the formalities required by law' by signing and sealing it, secs.—226, 248—which was afterwards done. For if it was passed as I think it was on the 20th October, the council could not on the 5th November, by merely refusing to do anything, undo what had been done ; and their action on the 7th April was superfluous and wrong, so far as it exceeded a mere direction to the officials to sign and seal it. I can see no reason why the by-law then signed and sealed may not be treated as the by-law passed on the 20th October, the date being merely surplusage—See *Re Michie and the City of Toronto*, 11 C. P. 379—and there

being on the evidence no reason to suppose that the instrument before the council on both occasions was not the same.

Again, if section 236 is obligatory and the council had no discretion to neglect or refuse to pass a by-law which had duly received the assent of the electors, they could not evade it, and render the proceedings abortive, merely by delaying to pass it for more than six weeks after it had been voted on. The provision as to time must be regarded as directory only, there being no negative words, *e. g.*, "and not afterwards," or "at no other time," in the section : *Rex v Sparrow*, 2 Strange 1123 ; *Pearse v. Morrice*, 2 A. & E. 96. In that case even if the proceedings of the 20th October are treated as irregular or null the council, in passing the by-law on the 7th April, 1874, were doing no more than they might have been compelled to do, and so it may be upheld on that ground, even though formally passed in a financial year other than that in which it takes effect ; the real passing being that which is derived from the vote of the electors, and the duty of the council being] merely to register their decree. Sub-section 1 of section 248 may perhaps suggest a verbal, though I think not an insuperable difficulty in the way of this construction and it would be impossible to hold sec. 236 to be of universal application. For instance, when the council originate and submit a by-law creating a debt by borrowing money to be expended by them for ordinary municipal purposes, it can hardly be contended that they are compelled to adopt or pass it after it has been carried at the polls, for if they did pass it they might repeal it before a debt was contracted under it: section 254. There is a distinction between such a by-law and one granting a bonus or other aid under section 471. Indeed it is probable that this section was first introduced into the Municipal Act with the view of preventing a council from interposing obstacles to by-laws of the latter class which have been approved by the popular vote.

In the case of *Harwich v. The Erie R. W. Co.* (*a*), before

(*a*) Not reported.

Blake, V. C., 3rd October, 1877, and afterwards affirmed on appeal, it was held that a county council had no power to repeal a by-law for granting a bonus to a railway, which had been passed under the company's Special Act. The case has not been reported, and I may therefore make the following extract from the judgment of the Court, which was delivered by the late Chief Justice Moss : " We are of opinion that the council had no authority to repeal the by-law. The company's Act of Incorporation, 36 Vic. ch. 70, O. provides that in case such a by-law be approved or carried by a majority of the votes given thereon, the council shall pass it within a month, and that within another month the debentures shall be issued and delivered to the trustees. We think that these provisions negative the existence of any power in the council to repeal the by law. This power, if possessed at all, might be exercised the moment after the third reading, and the positive directions to the council might thus be made illusory. It would have been useless for the Legislature to guard against the possibility of thwarting the popular will by neglect or refusal to pass the by-law, or deliver the debentures, if the same end could be effected by an instantaneous repeal. In thus holding we are by no means laying down the proposition that there is no class of by-laws which the council is powerless to repeal after they have been approved by the ratepayers. We simply decide that the existence of such a power is inconsistent with and impliedly negatived by the special provisions of the Act of Incorporation."

There is also a cardinal distinction between such by-laws as the one just referred to and those which can now by later legislation be passed for granting a bonus or other railway aid, which is this, that the former, from first to last, were by-laws over which the council had no control. They did not originate them ; they were compelled to submit them to be voted on, and merely provided the machinery by which the popular will was made effective. Now, on the other hand, it rests entirely with the council to determine whether they will submit a by-law at all. To say that a bonus

shall be granted is in their own discretion, and they submit the proposed by-law to a vote to ascertain if that discretion is approved of. The provisions of the Municipal Act in regard to the subsequent proceedings are less stringent than those which were formerly contained in the special Acts, and it may be that, apart from any rights which may be acquired by reason of the company having entered into obligations or performed work or conditions on the faith of the by-law, it will be found that the distinction here referred to is the test of the power of the municipality to refuse to pass the by-law, or to repeal it before a debt has been incurred under it.

This, however, is a subject which will be more appropriately considered in dealing with other objections which have been taken to the by-law.

I may add with reference to the action of the council on April 7th, 1884, that the expression in the 236th section, "The council which submitted the same," does not, in my opinion, mean the council of the particular year in which the by-law was submitted. The section was intended to apply to councils generally, *i. e.* to the councils of cities, towns, counties, townships, &c., which could submit such a by-law to be voted on. The language is fairly capable of this construction, and any other involves the inconvenience of holding that at a certain period of the year no by-law can be submitted to a vote, as the council which submit it will not be in existence when it comes to be voted on and passed.

It remains to be considered, in disposing of the objections to the by-law itself, whether the council could properly pass it in its present form. On its face it is valid, but it is not *verbatim et literatim* the proposed by-law published, submitted to the electors and voted on. That was a by-law invalid on its face, as the date fixed for it to take effect was December 13th, so that the debentures to be issued under it and payable on December 29th, 1893, would be payable more than twenty years from that day. In short, the word "13th" was substituted in the published copy for "30th."

Mr. Gormully argued that the only essential to the validity of the by-law was the assent of the electors, and that section 248 of the Municipal Act did not apply. I am, however, of opinion that, inasmuch as it is a by-law for contracting a debt within the jurisdiction of the council, it is within the very terms of, and must comply with the restrictions and provisions of that section : *Re Billings and the Township of Gloucester*, 10 U. C. R. 273.

The clause, therefore, which fixes the day on which the by-law is to take effect is a material one, as the Act expressly declares that it shall not be valid without it.

The question then comes to this. Could the council, when they came to pass the by-law, correct the error which had occurred in the published copy, and substitute 30th for 13th; or, which is perhaps the same thing, could they then, for the first time, insert the clause in question?

In re Bryant and the Municipality of Pittsburgh, 13 U. C. R. 347, a by-law to empower the corporation to take stock in the Kingston and Pembroke Railway was quashed on the ground that it had not been published beforehand in the form in which it ultimately passed. That was under a statute 14 & 15 Vict. c. 109 s. 16, which expressly enacted that the copy to be published should be "a copy of the by-law at length as the same shall be ultimately passed." The alteration in the by-law as passed was in a very material particular, diminishing the amount of stock authorized to be taken.

In Boulton and Corporation of Peterborough, 16 U. C. R. 380 it seemed uncertain whether the by-law moved against had been published under 14 & 15 Vict. c. 51, s. 18 (The Railway Clauses Consolidation Act) which provided that no municipality should subscribe for stock, &c., unless and until a by-law to that effect should have been duly made with the assent first had of a majority of the qualified electors after public advertisement thereof containing a copy of such by-law ; or under the later Act of 16 Vict. c. 22 s. 2 sub-s. 4, which only required that the by-law, or every material provision thereof, should be published.

The by-law as published contained no clause providing specially when it should come into force, so that as seen by the electors it would do so immediately on its passing.

It was passed by the council on the 15th September. A clause was then added that it should take effect on the 17th September, 1857. The Court observed that the words "a copy of the by-law," by fair construction meant the whole of it. But they said "the providing that it should come into operation two days after its passing did not really create a difference that we can suppose could possibly have influenced the decision of any of the electors." A debt had been incurred and debentures issued under the by-law, and the Court in their discretion refused to quash it on a summary application.

The case of *The Municipality of the Township of Brock v. The Toronto and Nipissing R. W. Co.* 17 Gr. 425, 431, does not assist the plaintiffs, as the learned Chancellor in dealing with the same section of the Consolidated Railway Act, C. S. C. ch. 66 sec. 77, has treated it as only requiring the consent of the electors to "a by-law to that effect," that is, that the municipality should subscribe for stock, &c.; overlooking, as I venture to think, the latter part of the section, which requires a copy of the proposed by-law to be advertised.

In re Michie and The City of Toronto, 11 C. P. 379, there was a motion to quash the by-law after a debt had been incurred under it on the ground, among others, that it did not name a day in the financial year in which it was to take effect. The Court, though leaning in favour of the objection, yet considering the mischief and inconvenience which would result from quashing it, declined in the exercise of their discretion to do so.

In *Re Nichol and the Township of Alnwick*, 41 U. C. R. 577 the by-law moved against was quashed on this ground, not having been acted on or any debt incurred under it.

In these last two cases the defect appeared on the face of the by-law. In *Re Lloyd and the Township of Elderslie*, 44 U. C. R. 235. The Court refused to quash a

by-law not defective on its face granting a railway bonus, on affidavits shewing that a comparatively trifling debt had been omitted from the clause in which the existing indebtedness ought to have been set forth.

In *re Gilchrist and the Township of Sullivan*, 44 U. C. R. 588, the last debenture to be issued under the by-law would be payable ten days beyond the period of twenty years from the day on which the by-law was to take effect, and there was, besides, a trifling error of \$150 in the amount which the rate would produce. The by-law was upheld, though defective on its face.

In these two cases the by-laws had been legalized by the Legislature subject to the application, and this fact no doubt weighed with the Court in dealing with technical errors where the spirit of the statute had not been violated.

From these cases, which do not appear to have been cited to my Brother Proudfoot at the hearing, I think it must be inferred that the Court would not have interfered to quash this by-law on the objection I am now considering. What the council did was to correct an error of absolutely the most formal kind, not having the least effect upon the liability the ratepayers believed they were assuming as to the rate, amount, terms, and mode of payment or conditions.

To adopt the language of the Court in *Boulton and Peterborough, supra*, it did not create a difference which we can suppose would possibly have influenced the votes of the electors.

The principle on which the Court acts in exercising the powers vested in them to quash by-laws, stated by Burns, J., in *Grierson v. The County of Ontario*, 9 U. C. R. 623, and subsequently approved and acted on in numerous cases, among which I may mention *Secord and the County of Lincoln*, 24 U. C. R. 147, and *Re Lloyd and the Township of Elderslie*, 44 U. C. R. 238, is this: "Unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is

such a manifest illegality in it that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained."

If there is no such manifest illegality as to induce the Court to quash the by-law, why should it not be enforced? If we may hold that the publication was substantially sufficient, and that the error might be corrected, I think it follows that so far as this objection is concerned, it is not a reason for refusing to enforce the by-law.

There are, however, other objections to the plaintiffs' claim based upon the nature of the defendants' obligation, which I think well founded. That obligation is accurately described by Strong, V. C., in *Luther v. Wood*, 19 Gr. 353. The defendants are not to be considered as contracting with the plaintiffs in consideration of the latter building a railway, &c, but as providing a gift to the company on certain conditions. "The debentures being then intended to be delivered by way of gift or bonus, I know of no doctrine of equity which would authorize this Court to treat the conditions as to time in which that gift was to take effect as immaterial. But even if the rights of the parties were to be adjudged on principles applicable to contracts it would make no difference, for the uni-lateral character of the contract, the performance or abandonment of it being optional with the defendants, would make it impossible to say that time was not essential." See also the judgment of Gwynne, J., in *The Grand Junction R. W. Co. v. The County of Peterborough*, 8 S. C. R. pp. 76, 120.

This by-law was passed to grant a bonus of \$100,000, not to the plaintiffs but to the Montreal and City of Ottawa Junction Railway Company, which had been incorporated on the 14th April, 1871, by the 34 Vic. ch. 47, D. for the construction of a line of railway from the city of Ottawa to a point on the Grand Trunk Railway at or near Coteau Landing.

The 18th section of that Act provided that the powers given by the Act should be exercised by the commencement of the railway within three years after its passing, and its completion within eight years therefrom.

The work of construction was begun in the month of August, 1871, and was prosecuted from that time until January, 1874, when the contractors failed, and nothing more was done upon the road until February, 1881.

On the 16th of April, 1878, the time for the completion of the road, which, under the original charter, would expire on the 14th of April, 1879, was extended for six years from the 30th of April, 1878, by 41 Vict. ch. 28, D.

On the 15th of May, 1879, the Act 42 Vict. ch. 57, D., was passed, to amalgamate this company and the Coteau and Province Line Railway and Bridge Company under the name of the Canada Atlantic Railway Company, the plaintiffs in this action, and the time for the completion of the works was extended for eight years from the 15th of May, 1879. About two years afterwards the work of construction was recommenced, and the road was completed in September, 1882, a period of nearly three-and-a-half years after the time limited by the original charter.

The defendants did not by their by-law limit a time for the completion of the road short of the time fixed by the company's charter, as the plaintiff municipality did by the by-law in question in *Luther v. Wood*, 19 Gr. 348. But having regard to the nature of the obligation they assumed. I am of opinion that when the time is not so limited by the by-law, there is an implied condition that the work shall be at least completed or that the bonus shall be earned within the time fixed by the charter. It was asked for by, and voted on by the people and granted to, a company with certain powers to be exercised within a time limited by their charter. The company were not bound to exercise them within the time, but they could not exercise them afterwards. That was the state of things on which the by-law was passed. The defendants say, exercise those powers, and we will grant a bonus.

That was a standing offer or obligation of which the company could take advantage at any time while they possessed the power under the existing charter, and if they had done so, they would have been entitled to say that it was upon the

faith of the promised bonus, payment of which would have been enforced accordingly. *Harwich v. Erie, &c. R. W. Co., supra*, per Blake, V. C., afterwards affirmed on appeal; *The State of Minnesota v. The Supervisors of the Town of Lime*, 23 Minnesota p. 521. But what the plaintiffs contend for is, that the defendants' obligation was unlimited, and instead of being conditional upon the exercise of the powers conferred by the Act in force when the by-law was passed and within the time limited thereby, it was conditional upon their exercise within any time to which the plaintiffs could induce Parliament to extend them.

We ought not, unless upon the clearest grounds, to accede to a construction which might, and in the present circumstances probably would, having regard to the altered conditions pointed out by my Brother Proudfoot, be productive of grave injustice. To do so we must add terms to the by-law which are not to be found therein.

It has relation to and must, I think, be read in connection with the then existing charter of the railway company, and as no provision was made to the contrary it lapsed when the time limited by that charter expired. See *Richmond v. North London R. W. Co.*, L. R. 3 Ch. 679; *Loosemore v. The Tiverton, &c., R. W. Co.*, 9 App. Cas. 480; 50 L. T. N. S. 648.

The case bears no resemblance to the *City of Toronto and Lake Huron R. W. Co. v. Crookshank*, 4 U. R. 309, for (1) we are dealing here with a voluntary gift, not an ordinary contract; and (2) in extending the charter of the plaintiffs, Parliament has not continued the obligation of the defendants; indeed I suppose it would not be argued that it could do so. It has been done in the case of bonuses to Provincial railways: See 41 Vict. ch. 51, O., and many instances of similar legislation might no doubt easily be found.

I have assumed, though I do not think it necessary to decide, that the amalgamation of the company to which the bonus was granted with another company would not *ipso facto* relieve the municipality from the obligation

created by the by-law, but I have no doubt that an amalgamating Act might contain such provisions as, in the absence of confirmatory legislation by the proper authority, to warrant the Court in holding that the conditions under which the gift had been promised had been so changed that it would be unjust to enforce it. In that view it might have been material to consider the bearing of the 10th section of the Amalgamating Act: *Pierce on Railroads*, 101, 102.

Nor have I referred to the Act (no doubt a private Act) by which the debt of the municipality was consolidated, and their power of taxation limited to a rate which would be exceeded if it was now attempted to enforce payment of the bonus: *Snarr v. Baldwin*, 11 C. P. 353; *County of York v. City of Toronto*, 21 C. P. 95 and cases there cited.

I see no reason to dissent from the view which my Brother Proudfoot has taken of the plaintiffs' case in other respects, and upon the whole my conclusion is, that the decree should be affirmed, with costs.

FERGUSON, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

RE LEA AND THE ONTARIO AND QUEBEC RAILWAY.

Dominion Railway Act, 1879—Appeal from award—Jurisdiction—Changing petition into action—R. S. O. c. 165, s. 20—42 Vic. c. 9, D.

An appeal on petition will not lie from the award of arbitrators appointed under the Dominion Railway Act, 1879, 42 Vic. c. 9, D. The only mode of impeaching such an award is, by an action to set it aside; or else to make the submission a rule of Court, and then move to set it aside.

The appeal given by R. S. O. c. 165, s. 20, sub-s. 19, only applies to railways over which the Provincial Legislature has jurisdiction, and is not available in such a case as the above.

Semblé; the Court has no power to turn such a petition as the present into an action.

THIS was an application on petition to set aside an award made by arbitrators against the petitioners in respect of land taken possession of by the Ontario and Quebec Railway Company.

The petition was heard on November 9th, 1883, before Proudfoot, J.

J. E. Rose, Q. C., for the petition.

Hector Cameron, Q. C., and R. M. Wells, for the railway company, took the preliminary objection that the Court had no jurisdiction to entertain the petition, as the submission to arbitration had not yet been made an order of this Court.

November 14th, 1883. PROUDFOOT, J.—This is a petition by way of appeal from the award of arbitrators appointed under the Dominion Railway Act of 1879. The submission has not been made a rule of Court. No special mode is provided in that Act for appealing from the award.

It was objected that as this was a Dominion Railway, and no special provision as to appeal, the only mode of impeaching the award was by an action to set it aside, or to make the submission a rule of Court, and then move to set it aside. That the appeal given by the R. S. O. ch. 165, sec. 20, sub-sec. 19, only applies to railways over which the Provincial Legislature has jurisdiction.

It has been determined that an arbitration under the Lands Clauses Act in England is an arbitration by consent under the Common Law Procedure Act: *Rhodes v. Airdale Drainage Commissioners*, 1 C. P. D. 402, and it was argued that the Common Law Procedure Act being within the jurisdiction of the Provincial Legislature, the appeal from an award of this nature was simply a matter of procedure in a civil matter, and so within the powers of the Local Legislature under sec. 92 of the British North America Act, and that the R. S. O. ch. 165, sec. 20, sub-sec. 19, gave a summary appeal applicable to all cases of awards under the Railway Acts, whether of the Dominion or the Province.

I feel constrained, reluctantly, to give effect to this objection.

None of the Railway Acts of Canada or of the Dominion gave this summary mode of appeal, but left the persons interested to the remedy by action to set it aside, or a motion for that purpose after making the submission a rule of Court. The case of *Rhodes v. Airdale Drainage Commissioners* shews that these arbitrations are brought within the Common Law Procedure Act. But under that Act, R. S. O. c. 50, it is only where parties to a voluntary reference agree by the terms of the submission that there may be an appeal to one of the Superior Courts, that an appeal shall lie in the same manner as in the case of a compulsory reference under secs. 189, 192. The other sections referring to voluntary submission (201 *et seq.*) contemplate making the submission a rule of Court unless agreed otherwise. In the present case there was no agreement for an appeal, nor has the submission been made a rule of Court. The summary mode of appeal provided by the Common Procedure Act, R. S. O. ch. 50, is not available.

But it was contended that the R. S. O. ch. 165, sec. 20, sub-sec. 19, must be considered as an amendment of the Common Law Procedure Act, and applicable to all arbitrations in such matters as fall under the Common Law

Procedure Act. It does not purport to be such an amendment. And the Act and all its provisions are expressly limited to railways under local jurisdiction. By the 2nd section the special Act means "any Act authorizing the construction of a railway with which this Act is incorporated." But the Ontario and Quebec Railway was incorporated by the Dominion Act, 44 Vic. ch. 44, and it was to have all the powers and privileges conferred on such corporation by "The Consolidated Railway Act of 1879, 42 Vict. ch. 9, Dom." The Railway Act of Ontario is not incorporated in it. The 4th section of this latter Act expresses the limited application of the Act in very clear terms. The lands also are to be those authorized by the special Act to be taken. The clauses in the Ontario Act as to lands and their valuation, and as to arbitration and award must be limited in the same way.

The *lands* that may be taken are the lands to which the special Act applies, but that special Act is by the definition excluded from the Ontario Act. The arbitration is to be about the same lands, and so with the award, and so the appeal given by the Ontario Act must be confined to appeals from awards in respect to railways under local jurisdiction.

Assuming therefore that this is a matter of procedure, and within the jurisdiction of the Local Legislature, the power to legislate upon it has not been exercised so as to apply to any other than local roads.

I do not think I have the power to turn the petition into an action, nor have I the power on the materials before me to enlarge the time for making the submission or award a rule of Court. The cases to which Mr. Rose was good enough to refer me, were considered in *Pardes v. Lloyd*, 5 A. R. 1, and held not to justify an extension of the time under circumstances more favourable to such an indulgence than exist in the present case.

I dismiss the petition, but without costs.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE MUSIC HALL BLOCK, DUMBLE V. MCINTOSH.

Discharge of mortgage—Registry Act—R. S. O. ch. 111, sec. 67—Insolvency—Inchoate right to dower—Partnership lands.

In respect to discharges of mortgages, what the Registry Act makes tantamount to a re-conveyance is the certificate of discharge and the registration of it, not the execution of the certificate merely. Therefore, where in 1868, R. O'N., in partnership with J. O'N. executed a mortgage on certain real estate, and his wife joined to bar her dower, and the mortgage money was subsequently paid, and a discharge of the mortgage signed but not registered, and afterwards the partnership became insolvent, and the mortgagee's executors conveyed the property to the assignee in insolvency, who had now contracted to sell to a purchaser.

Held, that the wife of R. O'N. could not have dower at law in the land in question, neither could she have dower out of the equitable estate, because that had passed away from her husband to the assignee, and the former could not now die seized of it.

In 1868, J. O'N. and R. O'N. executed a mortgage on certain land, which was in full force and unsatisfied at the date of their insolvency. Afterwards in 1879 it was declared by judgment of the Court to have been extinguished by lapse of time. Neither of the wives of J. O'N. and R. O'N. joined in this mortgage.

Held, nevertheless, that, in the face of the assignment in insolvency, the extinguishment of the mortgage did not have the effect of again vesting the estate in J. O'N. and R. O'N., so that the dower of their wives attached.

It appearing that certain lands owned by J. O'N. and R. O'N. were part of the assets of the partnership, having been purchased with partnership funds, and the rents afterwards collected and received by the partnership and treated in all respects as partnership moneys.

Held, that the wives of J. O'N. and R. O'N. had no inchoate right of dower in these lands.

THIS was an application under the Vendor and Purchaser Act, R. S. O., ch. 109. It was brought up on notice of motion, which stated that an application would be made on behalf of one David William Dumble, the purchaser, before a Judge in Chambers, in respect of an objection by the said Dumble, raised to the title of certain lands known as the Music Hall Block, and the St. Lawrence Hall Block, part of Block 55, Port Hope, to wit, respecting the outstanding inchoate rights of dower of the wives of James O'Neill and Richard O'Neill, of the Town of Port Hope.

The facts of the case appear from the judgment.

The motion came up for argument before Ferguson, J., on December 17th, 1883, when it stood over to December 21st, 1883.

J. MacLennan, Q. C., for the vendor.
Watson for the purchaser.

The following cases were cited on the argument: *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218; *Robertson v. Robertson*, 25 Gr. 486; *Martindale v. Clarkson*, 6 A. R. 1; *Re Joseph Neale*, 3 DeG. F. J. 645; *Wild v. Milne*, 26 Beav. 504; *Darby v. Darby*, 3 Drew. 495; *Davies v. Games*, 12 Ch. D. 813; *Conger v. Platt*, 25 U. C. R. 277; *Wylie v. Wylie*, 4 Gr. 278; *Sanborn v. Sanborn*, 11 Gr. 359; *Lind* on Partn. 3rd ed., p. 668-9, 688; *Scribner* on Dower, vol. 2, p. 536-9; *Cameron* on Dower, p. 178; *Sugden* on Vend. and Purch., 14th ed., p. 385-8; *Smith's Merc. Law*, 5th ed., p. 79; *ib.* 9th ed., p. 169.

January 7th, 1884. FERGUSON, J.—These parcels of land formerly belonged to James O'Neill and Richard O'Neill, who carried on business as merchants in partnership under the name and firm of J. & R. O'Neill, in the town of Port Hope, and afterwards in the city of Montreal.

While engaged in business in Montreal, they became embarrassed, and on the 8th day of January, 1877, they made an assignment under the provisions of the Insolvent Act of 1875, and the then amending Acts, and on the 5th day of February, 1877, James Court was appointed creditors' assignee of the estate. Afterwards, for some reason which it is not necessary to mention here, John McIntosh became the assignee.

In the statement of their affairs in insolvency, the insolvents mentioned these lands as assets, the expression in the statement being "Real Estate, Port Hope, including farm and town lots, \$62,000."

The statement also showed that this real estate was subject to mortgages amounting in all to \$33,000, thus shewing a balance in respect of this item of \$29,000.

There appears to have been litigation and consequent delay in winding up of the estate. I do not at all mean to intimate that this was unnecessarily so, as there appear to have been very substantial matters in contention. The assignee, Mr. McIntosh, in the prosecution of his duties as assignee, on the 5th day of October last, (1883) entered into a contract with Mr. D. W. Dumble for the sale to him, Dumble, of these properties for the sum of \$24,000. Amongst the provisions of their contract is one providing that the purchaser should investigate the title at his own expense, and that the vendors would only produce such deeds and documents of title as were in his possession.

Between the solicitors for the purchaser and those for the vendor, a difficulty arose as to the existence or not of an inchoate right of dower in the wives of the O'Neills. Amongst the objections or requisitions in respect of the title is the one mentioned in the notice of this application, and stated therein in these words : "An objection by the said David William Dumble raised to the title of the said land, to wit : respecting the outstanding *inchoate* rights of dower of the wives of James O'Neill and Richard O'Neill, of the town of Port Hope."

I understand that all other objections to the title have been satisfied or disposed of in some way. At all events I have on this application to deal only with this one, and the questions to be determined seem to be whether or not there exist such inchoate rights of dower, and if not, then whether or not this fact has been sufficiently made to appear to the purchaser, the provision of the contract to which I have referred being taken into consideration.

On the question as to whether or not such inchoate rights of dower have any existence, counsel for the vendor placed his contention upon two grounds, the first being that owing to the execution of certain mortgages upon the properties, what was done in regard to some of them, and to the fact of the assignment of the equities of redemption to the assignee in insolvency, no such rights of dower had any existence ; and the second, that the lands were part-

nership property assets of the firm, and that no dower or right of dower could arise or exist in respect of them.

As to the first of these contentions: It appears that Richard O'Neill was married to his present wife before any of the transactions referred to, but James O'Neill was not married till the year 1872. In the year 1868, a mortgage upon the Music Hall Block was made in favour of one Nood, from whom this property had been purchased. This was as it is said to secure unpaid purchase money, and was executed by both James and Richard O'Neill, and also by Richard's wife, for the purpose of barring her dower. Counsel agree in the statement that this mortgage money had been paid, and a discharge of the mortgage signed but not registered, and that after the assignment of the O'Neills in insolvency, the executors of the estate of Nood (who had died in the meantime) gave to the assignee a conveyance of the property. Counsel for the purchaser contended that inasmuch as the acts of the payment of the mortgage money, and the signing of the discharge had taken place long before the insolvency, Richard O'Neill's wife was entitled to dower at law notwithstanding the fact of her having executed the mortgage to bar her dower, but I think that under the Registry Act, R. S. O. ch. 111, what is made tantamount to a re-conveyance is the certificate and the registration of it. The words of the Act are, sec. 67: "And such certificate so registered shall be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, &c., * * of the original estate of the mortgagor." There being no release of the mortgage or re-conveyance of the estate, and no registration of the certificate of the discharge, the legal estate remained in the mortgagee and his representatives, and the Act 42 Vic. ch. 22, not applying to the case (*Martendale v. Clarkson*, 6 A. R. 1), I do not see how Richard O'Neill's wife could have dower at law in this parcel of the land. Owing, however, to a subsequent mortgage upon this parcel, which will be hereafter mentioned, this may not be so important as it would perhaps otherwise be. She cannot

have dower out of the equitable estate because this has passed away from her husband, and he cannot now die seized of it.

This mortgage was executed by James O'Neill before his marriage. At the time of his marriage he had only an equity. This has passed away from him. He cannot die seized of it, and his wife cannot have dower out of it.

On the 9th of September, 1868, a mortgage on the St. Lawrence Block in favour of Mary Ann Walsh was executed by James O'Neill and Richard O'Neill. This mortgage appears to have been in full force and unsatisfied at the date of the assignment by the O'Neills in insolvency, but was afterwards declared by a judgment of the Court to have been extinguished by lapse of time on the 9th day of September, 1879.

Neither of the wives of the O'Neills had executed this mortgage, and it was contended that this extinguishment of the mortgage had the effect of again vesting the estate in the mortgagors, so that the dower of the wife of James O'Neill attached. But in the face of the assignment in insolvency I am unable to perceive how this could be and I am of the opinion that the dower of James O'Neill's wife did not so attach, and that as her husband cannot now die seized of the equity in the parcel, she has no rights of dower in it whatever.

On the 3rd day of May, 1869, James and Richard O'Neill executed a mortgage on both blocks or parcels of land in favour of Bridget and Mary Doran. This contained no bar of dower. It is said that the larger part of the purchase money arising upon this sale is to be applied in payment of the claim upon this mortgage.

On the 21st of January, 1870, a mortgage upon the Music Hall Block was executed by both the O'Neills in favour of James Walsh for securing the sum of \$5,000. Richard O'Neill's wife executed this mortgage for the purpose of barring her dower. This is one of the mortgages for redemption of which James Court, the assignee of the O'Neills, brought the suit known as *Court v. Holland*, and

in that suit the usual redemption decree was pronounced on the 24th day of May, 1879 (*a*). On redemption the mortgagee will convey, if he has not already done so, to the plaintiff in that suit, who is the assignee to whom the equity of redemption was assigned, and I do not see how under such circumstances there can be any right of dower on the part of Richard O'Neill's wife in respect of this Music Hall Block, even if the contention of counsel for the present purchaser in respect to the mortgage to Nood were correct, and I have said already that I do not think that contention was correct.

There were two other mortgages, each upon both these blocks or parcels, executed by James and Richard O'Neill, one on the 19th of February, 1875, in favour of Bridget and Mary Doran, and the other on the 1st of March, 1875, in favour of James and Mary Walsh. In neither of these was there any bar of dower, and I do not see that they affect the question here.

So far, it appears to me that even assuming the property not to be partnership assets, the wife of James O'Neill cannot have any rights of dower whatever in respect of either of these blocks of land, and that the wife of Richard O'Neill cannot have any right of dower in respect of the Music Hall Block, but may have an *inchoate* right of dower at law in respect of the St. Lawrence Block.

Then as to the second contention of the vendor's counsel, and particularly in respect of the St. Lawrence Block. A statutory declaration of Mr. David Smart, of the town of Port Hope, barrister-at-law, is produced, which is as follows: "I * * do solemnly declare that I acted for the firm of J. & R. O'Neill, (composed of James O'Neill and Richard O'Neill), in the year 1865, in the purchase by them from Hiram Gillett, of the St. Lawrence Hall Block, in the town of Port Hope, being part of the property the subject of sale in this matter.

2. "Richard O'Neill, one of the partners in the said firm, acting on behalf of the said firm, instructed me in the

(*a*) See 4 O. R. 688.

said matter of the said purchase, and gave me a cheque for \$7,000, with which to pay for the said property.

3. "Pursuant to such instructions I searched the title, paid off the encumbrances on the property out of the proceeds of the said cheque, and paid the balance of the said purchase money to Hiram Gillett, and I verily believe that the purchase was intended to be and in fact was a transaction of the said partnership firm, and the said land has always been held by the said James and Richard O'Neill as partnership property."

An affidavit of the same witness is produced in which he verifies copies of the entries on pages of the ledgers of the firm J. & R. O'Neill, in the year 1875, in which it appears that accounts were kept with contractors for the construction of buildings on the property, and that they were paid by the firm, some of the payments being made by, as it is stated in the affidavit, a multitude of small debit entries of charges for goods. In this affidavit the deponent refers to a conversation that he had with James O'Neill in regard to his wife's claim for dower in the Music Hall and St. Lawrence Hall, in which he says that James O'Neill said to the effect that he had taken legal advice, and that he supposed his wife could not succeed in a claim for dower.

An affidavit of one Thomas A. Kelloway is produced, in which the deponent says that he was the contractor for the carpenter work in the erection of the Music Hall for the late firm of J. & R. O'Neill, who supplied him with the greater part of the material necessary therefor, and that he was paid his contract price and some extras in goods and cash out of the store of the said firm as he required the same from time to time.

An affidavit of John Mahon Wallace is also produced, in which he says that he and another, his partner, were contractors for the mason and brick work of the same Hall, and that they were paid in goods and cash out of the store of the said firm.

Another affidavit of Smart is produced, in which he says that the contractor Kelloway complained to him that he

had to take most of his contract price in goods out of J. & R. O'Neill's store instead of cash.

A part of an examination of James O'Neill in a suit *Court v. Walsh* is produced (b), in which he says: "Defendant, I think, collected rents for us from our Port Hope property, but I cannot tell when he commenced to do so. Our rents were about \$3,500 a year. I do not think he applied them on his mortgage. He may have applied a year's rent. I do not remember he remitted any rent. He was my tenant at about \$600 a year. Whether he was charged with it or not I do not know, or paid it. One tenant paid \$1,400 a year; Dobler, \$250; McKay, \$250 or \$300; Canith about \$300; the Telegraph Office, 120; Pringle, \$200; Barber Shop, \$120; Music Hall, \$500."

In another place he says: "Defendant collected our rents and remitted them to us."

The entries upon a very large number of pages in the books of the firm J. & R. O'Neill, are produced by copies, some verified and some certified—their accuracy not being at all disputed before me—and these shew, I think, beyond any reasonable doubt that the rents of these properties were received by the firm, and were, so far as I can perceive, uniformly treated and dealt with as moneys of the partnership.

Reference was made to the evidence in the suit *Court v. Holland*, 4 O. R. 688, taken in the Master's office, tending to shew that these properties belonged to the partnership, and were assets of the firm, but this is quite too voluminous to be stated here. It was stated, and not denied, that the purchaser's attention was directed to this, and to the evidence and papers and documents to which I have alluded, in order to satisfy him that the properties were partnership assets, and that there could be no valid claim for dower in respect of them, and that copies of the affidavits and extracts from the evidence were given him for this purpose.

Now in regard to the St. Lawrence Hall Block, part of the property sold, it appears, I think, that this was

(b.) See 1 O. R. 167.

purchased with partnership funds: that the rents of it were collected and received by the partnership, and were passed through their books and went into the moneys of the partnership, and were in all respects treated as partnership moneys, and that the equity of redemption in the property was finally brought by the partners into the statement of their affairs in insolvency as part of the partnership assets. I think these appear to be the facts in respect of both properties, but it is now necessary to speak only of the St. Lawrence Hall Block. There is nothing whatever to shew or having any tendency to shew that the purchase was made with the intention of withdrawing from the trade of the firm the amount employed in the purchase and converting it into separate property of the partners, or that the property was bought on account of either of the partners, he becoming a debtor to the partnership for the amount of the purchase. Nothing has appeared to shew that this property was at any time separated from the other assets of the partnership. I do not think the forms of the conveyances, even if they were inconsistent with the idea of conveyances to the partnership, (these are not produced) would make any difference. Lord Justice Turner says, in the case *Ex parte Joseph Neale*, 3 DeG. F. & J. at p. 658 : "It cannot, I think, be laid down as a universal rule, that, when lands are bought by partners in trade, and are paid for out of the partnership assets, they, of necessity, become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. They may have been bought for the purpose of being used and employed in the trade * * * or they may have been bought, not for the purpose of being used or employed in the trade, but for the purpose of a mere speculation on account of the partnership, for I know nothing which can prevent partners from speculating in land, if they think proper to do so, as freely as they may speculate in mere articles of commerce, though foreign to their trade. Again, they may have been bought without reference to the purposes of the trade or the benefit of the

partnership, with the intention of withdrawing from the trade the amount employed in the purchase, and converting that amount into separate property of the partners, or they may have been bought on account of one or more of the partners, he or they becoming debtors to the partnership for the amount laid out in the purchase. The form of the conveyance in these cases does not settle the question, for in whatever form the conveyance may be, there may be a trust of the land which may follow the money, liable however, as other trusts of a like nature, to be rebutted by evidence. Where land purchased is not merely paid for out of the partnership assets, but is bought for the purpose of being used and employed in the partnership trade, it is scarcely possible to conceive a case in which there could be sufficient evidence to rebut the trust, and accordingly in those cases we find decisions almost if not entirely uniform that the purchased land forms part of the joint estate of the partnership; but where the land is not purchased for these purposes, the question becomes more open, and we have to consider whether the circumstances attending the purchase shew that it was made an account of the partnership individually, or of any one or more of them in whose name the land may have been bought. These, as it seems to me, are the considerations that must guide our determination in the cases before us."

The Lord Justice further says: "That the estate here in question was not purchased for the purpose of being used and employed in the partnership trade is abundantly clear and that view of the case may be laid out of consideration. That the whole of the estate was not purchased with the view of withdrawing the amount of the purchase money from the trade, by way of investment on account of the partners individually in their separate capacities, or on account of either of the partners by way of loan from the partnership, seems upon the evidence to be equally clear. It is negatived by the whole course of dealing with the estate, and by the mode in which the accounts of the estate were kept."

It was held in that case the purchase must, upon the evidence, be taken to have been made by way of speculation on account of the partnership, and that the lands were part of the assets or joint estate of the partnership.

In the case *Darby v. Darby*, 3 Drew. 505, the learned Judge says: "I should, therefore, feel no hesitation in coming to this conclusion, that the mere contract of partnership, without any express stipulation, involves in it an implied contract, quite as stringent as if it were expressed, that at the dissolution of the partnership all the property then belonging to the partnership, whether it be ordinary stock-in-trade, or a leasehold interests, or a fee simple estate in land, shall be sold, and the net proceeds after satisfying all the partnership debts and liabilities be divided amongst the partners, and that each partner and the representatives of any deceased partner have a right to insist upon this being done."

And again at p. 506: "Now, if it be established that by the contract of partnership all the partnership property is to be sold at the dissolution of the partnership, then any real property which has become the property of the partnership becomes by force of the partnership contract converted into personalty, and that not merely as between the partners, to the extent of discharging the partnership debts, but as between the real and personal representatives of any deceased partner."

Now looking at the whole matter as presented to me, (and I may here say that I have not attempted to refer to all the evidence and to every circumstance that appeared,) I think it beyond reasonable doubt that this St. Lawrence Hall Block was one of the assets of the partnership, and must be considered as converted into personalty, and that the wife of Richard O'Neill can have no inchoate right of dower in respect of it. I have already stated that she has not, in my opinion, any right of dower in respect of the Music Hall Block, and that the wife of James O'Neill has not, as it appears to me, any right of dower in respect of either the Music Hall Block or the St. Lawrence Hall Block.

I am of the opinion that it has been sufficiently made to appear that neither the wife of James O'Neill nor the wife of Richard O'Neill has any right of dower, inchoate or otherwise, in respect of either parcel of land embraced in the contract of purchase and sale. I am further of the opinion that, looking at the provision of the contract to which I have before referred, and what is proved to have been done by the solicitors for the vendor, this was sufficiently shewn to the purchaser before this application, and I think the purchaser should pay the vendor's costs of and incidental to this application, the same to be taxed by the proper officer.

Judgment accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

BURN V. BURN.

Undue influence—Father and son—Parties—Privity—Action against executor and surviving partner—Corroborative evidence—R. S. O. c. 62, s. 10.

D. B. and W. D. B. were partners in a certain Joint Stock Savings Bank, under articles which provided that the partnership should last during their joint lives, and that they should share the profits and expenses. D. B. died in April, 1874, leaving a will, whereby he bequeathed to W. S. B., the son of W. D. B., the residue of his property, including his interest in the bank, and appointed L. his executor. In May, 1874, L. gave W. D. B. a general power of attorney to act for him. In July, 1879, W. S. B. came of age, and soon after demanded of W. D. B. an account of the assets of the partnership and a settlement with him; and in November, 1880, W. D. B. gave the plaintiff a cheque for \$8000, handing him at the same time a document for signature, which purported to be a receipt of the said sum in full of all claims on the estate of D. B., and W. S. B. signed it. W. S. B. now brought this action against W. D. B. and L., alleging that after the death of D. B., W. D. B., with L.'s connivance, made certain arrangements for the winding up of the partnership, and that large portions of the assets of D. B. and of the bank had been realized, and profits made, and converted by W. D. B. to his own use, and claiming to have the said release declared void, and an account of the estate of D. B., and of the partnership, and to have the same wound up, and payment of the share to which he was entitled.

Held, that as to the alleged settlement of November, 1880, W. S. B. and his father could not be said to have been on equal terms, and the document in question was not binding upon the former; that it was clearly the duty of his father, before making any settlement with him, to give him the fullest possible information regarding the estate and his dealings with it, even if then, under the circumstances, a settlement binding on the plaintiff could have been made.

Held, that the suit in its present shape was maintainable, for though the general rule is, that persons who have possessed themselves of the property of the deceased, or are debtors to the estate generally, cannot be made parties to a suit against the executor, yet this rule is relaxed in the case of surviving partners of the deceased, whom it is allowed to make parties with the executor in order that the plaintiff may have an account of the personal estate entire. At all events such an action may be supported in all cases where the relationship between the executors and the surviving partners is such as to present a substantial impediment in the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners, as seemed the case here, although it did not appear that there had been actual collusion between L. and W. B. D.

W. D. B. alleged that in 1872, D. B. transferred to him as a gift 100 shares of a certain stock, part of the assets of the firm, and as corroborative evidence thereof proved the transfer of the stock to him, and a re-transfer afterward on January 30th, 1873; which re-transfer, he said, was to prevent the surplus of the savings bank appearing to be less, and also produced the printed statement of the Savings Bank of December 31st, 1872, showing this stock.

Held, that this was not such corroborative evidence of the gift as satisfied the statute R. S. O. ch. 62, sec. 10.

Held, on the whole case, that the plaintiff was entitled to the account asked, and that as regarded the increase or profits in the dealings with the capital of the estate, these should be proportioned in accordance with the amount of such capital owned respectively by the testator and the defendant, W. D. B.; and the defendant, W. D. B. should be allowed a liberal remuneration for his exertions, care, time, and trouble in the management of the estate, which appeared to have been skilful and successful.

THIS was an action brought by Walter Scott Burn against William David Burn, and William Logan, seeking that a certain document purporting to be a complete release by him of all his claims against the estate of one David Burn, deceased, might be declared void, and for an account from the defendants, or one of them, under the circumstances which are fully set out in the judgment.

The evidence in the action was tried at Toronto on May 21st, 22nd, 26th, and 28th, 1883, before Ferguson, J.

The defendant Logan did not defend the action.

B. B. Osler, Q. C. and T. S. Plumb, for the plaintiff. This suit has been brought on the following authorities, which shew it can be sustained against the executor and the surviving partner: *Williams on Exrs.*, 8th ed., p. 2025; *Bowsher v. Watkins*, 1 R. & M. 277; *Newland v. Champion*, 1 Ves. Scn. 104; *Gedge v. Trail*, 1 R. & M. 281 n. As to the alleged transfer of stock there is no corroborative evidence. The partners were equally entitled to profits up to the death, but after that the profits are in proportion to the capital of each, with or without an allowance for services; *Yates v. Finn*, 13 Ch. D. 839. The defendant Burn cannot claim the profits accruing since the death for himself. They did not arise by reason of any skill in the future business, but from the winding-up of the business. He is in the same position as a trustee of an estate, who mortgages it to pay off the debts, and the estate increases in value. He cannot claim profits arising in that way. Nothing has occurred that can on any legal principle change the proportion of profits to which the defendant Burn is entitled. The other side will rely upon *Simpson v. Chapman*, 4 DeG. M. & G. 154, but this turns upon the overdrawn account.

The profits there could not be attributed to the capital of the deceased, for he had no capital. The cases of *Vise v. Foster*, L. R. 7 H. L. 318; *Brown v. DeTastett*, Jac. 284; *Cook v. Collingridge*, *Ib.*, 607; and *Crawshay v. Collins*, 15 Ves. 218, may also be cited. As to the alleged settlement between the plaintiff and his father, it was only sixteen months after the plaintiff came of age, and the latter did not give the plaintiff what he was entitled to in any view of the case. Before he can hold the plaintiff to the settlement he must show that the latter had full knowledge, and was in a position equal to his own. The receipt and cheque were prepared before the plaintiff arrived. See *Watson's Comp. of Eq.*, p. 289; *Huguenin v. Baseley*, Wh. & T. L. C., 5th ed., vol. 2, p. 547 *seq*; *Irwin v. Young*, 28 Gr. 511; *Lindley on Partn.*, 4th ed. p. 976; *Stroud v. Guyer*, 28 Bea. 130.

C. Moss, Q. C., for the defendant Burn. So far as this case is an application to compel a surviving partner to account for profits, it is not unprecedented, but in all the cases of this sort the relief was awarded at the discretion of the Court. It is not a matter of right to the plaintiff; and a fair measure of relief is awarded by giving the plaintiff a fair reimbursement in respect of the interest that he represents. There is no general rule, but each case must depend upon its own circumstances: *Willett v. Blanford*, 1 Ha. 253. The relief should not go beyond that in *Simpson v. Chapman*, 4 DeG. M. & G. 154, and *Wedderburn v. Wedderburn*, 22 Bea. 84. The defendant Burn showed great skill, tact, and courage in his conduct of the business; and through his financing it is that so much of the estate of the plaintiff's uncle was saved. The Court should exercise its discretion by not allowing the plaintiff any more than the \$8,000 he has received. Then the plaintiff has been guilty of great *laches*: *Knox v. Gye*, L. R. 5 H. L. 656. In this case the capital did not contribute to the profits at all. Nothing was used in the business. It was only an additional security to keep the creditors quiet; and it should not even carry interest, but it was used in

such a way as was necessary to save its own existence for the plaintiff's benefit. As to the receipt for the \$8,000, the plaintiff was not under the control of his father. He had not lived with him, and had been largely engaged in business. He knew he need not take the cheque, but he was willing to take his chance. He knew about bank stock, and what his rights were; but deliberately made up his mind to take the money. Then the plaintiff cannot maintain this action against my client. There is no privity. *Bowsher v. Watkins*, 1 Russ. & M. 277; *Gedge v. Trail*, *Ib.* 281 n., and such cases are not authorities for it. There is a class of cases where the legatee can sue the executor and debtor, but this is where there is collusion. I refer to *Yeatman v. Yeatman*, 7 Ch. D. 210, as to this. The evidence shews there was no collusion. *Stainton v. The Carron Co.*, 18 Bea. 146, shews it is necessary that there should be some impediment preventing the executor suing, but there is none here. I also refer to *Cattanach v. Urquhart*, 6 P. R. 28; *Corporation of Houghton v. Freeland*, 26 Gr. 500.

T. S. Plumb, in reply. When profits are attributable to capital they must be accounted for: *Willett v. Blanford*, 1 Ha. 253. In *Wedderburn v. Wedderburn*, 22 Bea. 84, the assets were wholly insufficient to meet the liabilities, but that is not so here. In *Simpson v. Chapman*, 4 DeG. M. & 154, the partnership was that of banking, and was insolvent at the death. I refer, also, to *Macdonald v. Richardson*, 1 Giff. 81; *Flockton v. Bunning*, 8 Chy. 323 n.; *Darby and Bosanquet*, on Limitations, p. 184; *Teed v. Biere*, 5 Jur. N. S. 381; O. J. A., Rule 474. As to the question of privity, see *Hateley v. Merchants Despatch Co.*, 4 O. R. 723^(a); *Biscoe v. Ward*, 1 C. L. T. 129; *Maclennan's* O. J. A., 1st ed., notes to Rule 112; and as to the receipt see *Watson's Comp.* 290; *ib.* 287; *Irwin v. Young*, 28 Gr. 511.

(a) This case has been argued in the Court of Appeal, and stands for judgment.

March 3rd, 1884. FERGUSON, J.—The defendant Logan did not defend. The plaintiff is Walter Scott Burn, and is the son of the defendant William David Burn. The plaintiff was the grand nephew of the testator, David Burn.

On the 23rd of June, 1873, the said David Burn made and published his will, whereby, after devising to the plaintiff certain lands, about which there is now no dispute, and giving a legacy of \$100 to the defendant Logan, who is a clergyman, he bequeathed the residue of his personal property to the plaintiff in these words :

3. "All the rest residue and remainder of my personal property and effects, whatsoever and wheresoever, I give and bequeath unto my said grand nephew, Walter Scott Burn, his heirs, executors, administrators, and assigns ; and in the event of the decease of the said Walter Scott Burn before attaining the age of twenty-one years, then to the next surviving brother of my said grand nephew, Walter Scott Burn, his heirs, executors, administrators, and assigns forever. And I hereby nominate my said grand nephew, Walter Scott Burn, or, in case of his decease, his eldest surviving brother, to succeed to my share and interest in the joint business at present carried on by me and Thomas Burnett, of the Town of Cobourg, as co-partners, under the name, style, and firm of Burn & Co., and also to succeed to the capital, or joint stock thereof, and the gains and profits thereof."

The testator appointed the defendant Logan and two others executors of his will. He afterwards made a codicil to this will, but it disposed only of certain lands, which are not the subject of any contention here.

The testator died on the 23rd day of April, 1874. Probate of the will and codicil was duly issued to the defendant Logan, the other two persons named as executors having renounced probate thereof.

At the date of the death of the testator he was a member of the firm of Burn & Co., then carrying on a savings bank business in the town of Cobourg, and the defendant

William David Burn, was the other member of the said firm. The articles of the partnership bear date the 12th day of April, 1873, and after reciting that the parties thereto had agreed to enter into co-partnership for the purpose of carrying on the business of a savings bank in the town of Cobourg upon the terms therein set forth, 'amongst other things provided that the co-partnership should commence on the day of the date of the articles and continue during the joint lives of the parties thereto: that the defendant William David Burn, should be entitled to one-half interest in the business, and in the profits thereof: that each of the partners should bear one half of the expenses of carrying on the business, and that each of them should be entitled to one half the gains and profits to be derived from the business: that the defendant William David Burn should devote the whole of his time to the business, and that the testator, David Burn, should not be obliged to attend to the business of the partnership any further than he should think proper.

The whole of the capital stock of the partnership was contributed by the testator. The business was the identical business mentioned in the will as being carried on by the testator and Thomas Burnett.

The defendant, William David Burn, in his evidence says, that at the commencement of the partnership the assets consisted of bank stocks entirely, Dominion Bank and Montreal Bank stock, and that as the depositors deposited their money it was invested in Dominion Bank stock. He says that at the time of the death of the testator the firm had only Dominion Bank stock, that they had \$200,000 of this that had cost 9 per cent. premium, that they had lost 6 per cent. on \$12,000 of this stock, that there was cash on hand at the time of closing of the bank on the 6th of May, 1874, about a fortnight after the death of the testator, \$52,790, and a small amount in silver \$27.35, that there were bills payable \$33,000, that there were deposits \$227,248, payable on demand, that when his uncle the testator died, there was a margin of \$18,000, taking the

stock at what it cost ; but that the stock was not worth then what it had cost, and that putting so large a quantity of it upon the market at one time would have depreciated it in value. He also says that if the estate could have been wound up on the 6th day of May, 1874, selling the stock at what it cost, there would have been \$18,147.72 for the partners to get. He says that throughout the weekly balance sheets, prior to the partnership between him and the testator, the capital of the bank appears at \$11,500, and that this sum was still carried on as the capital through the accounts of the firm.

This defendant William David Burn also says that on the 23rd day of December, 1873, his uncle, the testator, transferred to him, by way of gift, 100 shares of this stock. He says that it was a gift from his uncle to him, and that the testator said, at the time, that he had brought him (the defendant Burn) over here (from the United States) and that if anything happened to him it would leave him (the defendant Burn) in a bad position. He says this gift was not a thing to be done in the future, that it was done and completed then. A re-transfer of this stock took place on the 30th day of January, 1873, and this defendant says this was done so as not to have the surplus of the bank appear \$5,000 less. This stock appears on the printed statement of the bank of the 31st of December, 1872. The defendant Burn says that he never had any capital in the bank but these 100 shares, and he claims that the whole capital was the \$11,500 mentioned before, and that this uncle, the testator, had only \$1,500 more capital in the bank than he himself had.

On the 6th day of May, 1874, the defendant Logan, as executor of the will of the testator gave to the defendant Burn a general power of attorney to act for him. This power of attorney is as full and ample as it could well be drawn. This 6th of May, 1874, is the same day as the saving bank was closed, and the time at which this defendant says there would have been \$18,147.72, for the partners if the stock could have been sold for what it had cost.

The defendant Logan did not, nor did the defendant Burn, attempt to wind up or administer the estate of the testator. The defendant Logan seems to have done little, if anything, in the matter of the estate after giving this power of attorney, except assisting on some occasion to transfer stock belonging to the estate.

The plaintiff says in his statement of claim that on the death of the testator the assets of the saving bank were very much larger, and that with the aid of these, and with the consent and connivance of the defendant Logan the defendant Burn was enabled to conclude negotiations and to enter into an agreement with the Dominion Bank of Canada, whereby the bank agreed to take over the said partnership business, and to carry the partnership assets for the benefit of the partnership until the same could be advantageously wound up, and that large portions of such assets have since been realized at greatly increased values, and that these, together with the profits of the said partnership business, and the private estate of the testator, and the profits realized thereon, have been received by the defendant Burn, and applied to his own use, except as to the sum of \$8,000, which will be referred to hereafter.

At the death of the testator the plaintiff was an infant and attained his majority in the month of July, 1879.

Soon after the death of the testator the defendant Burn became the local agent or manager of the Dominion Bank, at Cobourg. By the aid of this bank and of some of the directors of it, he was enabled to pledge, and as it appears did pledge the stock that was held by the firm of Burn & Co., for money with which to pay off the depositors with that firm. This stock was kept under pledge, or in some way by the defendant Burn, until in the end he derived a very large sum of money by way of profit from it. According to the defendant Burn's evidence he had sometimes great difficulty in carrying this stock. He had on some occasions to pay margins in order to keep the stock, as I understand, a sufficient security for the money he had borrowed upon it and on one occasion he mortgaged a small

property of his own to obtain money to do this, but he says that as a general thing the stock "carried" or took care of itself, and sometimes he got dividends in excess of the interest he had to pay upon the loan upon the stock. He sold some of the stock eventually at 130 and some at 180, and he got an allotment of new stock of one share upon every two on 550 shares of the stock at 150. This allotment was 275 shares at 150, which he sold at 200, realizing a very large sum indeed.

As to the arrangement between the defendant Burn and the Dominion Bank, the witness, Mr. Bethune, the cashier of that Bank, says that after the death of the testator he asked the defendant Burn to take the management of a branch at Cobourg, that he consented, and that it was arranged that he was to use his influence to get the business that had been the business of the Savings Bank of Burn & Co., and that when the defendant Burn took the branch "we" said to him that if he wanted to carry any stock one of our directors would assist him. The evidence showed that some of the directors of the Dominion Bank did afterwards assist him.

Shortly after, or not very long after the plaintiff attained his majority, he asked his father, the defendant Burn, for a statement of the accounts and payment or settlement. An appointment was made between them for the 16th of November, 1880, when the plaintiff went to the office of the defendant, when a document was offered to him by his father to sign, which he did sign, and was given by his father a cheque for \$8,000. This document was in the form of a receipt and was as follows:—

"Received from W. D. Burn the sum of eight thousand dollars, the same being in full payment, compensation, and satisfaction to me of all and any moneys, interest, and privileges to me belonging, both from the estate of the late David Burn, Esq., and also from the said W. D. Burn, as set forth in this will or otherwise. The receipt of which is hereby acknowledged.

"Dated at Cobourg this 16th November, 1880.

"Witness—E. HOLDEN.

"W. S. BURN."

It would appear that this document was endorsed upon a will, or intended will, of the defendant Burn.

The plaintiff alleges that this document is not binding upon him any further than as a receipt for the \$8,000 that he received. The defendant Logan says he is unable to render any account to the plaintiff, and says that if the plaintiff would sue him, then he would sue the defendant Burn. The plaintiff asks to have the document above set forth declared void, to have an account rendered to him by the defendants, or one or the other of them, of the estate of the testator, David Burn, come into their hands, and of the defendants' dealing therewith, and to be paid the share thereof to which, under the last will and codicil of the testator, David Burn, the plaintiff is entitled, and to have an account taken of the partnership estate and effects of the firm of Burn & Co's. Saving Bank come into the hands of the defendants, or either of them, and of their dealings therewith, and to have the said partnership wound up, and to be paid the share of past and present profits to which, under the said will and codicil, he, the plaintiff, is entitled, with interest thereon. And to have the personal estate of the testator, David Burn, administered under the direction of the Court. General relief is also claimed.

The defendant Burn, in his statement of defence, amongst other things, says that at the time of the death of the testator the assets of the firm of Burn & Co. were in such a position that if realized upon they would not have satisfied the debts and liabilities, and that it was only through careful management of him, the defendant Burn, and by means of money borrowed upon his own responsibility, and in respect of which he alone became liable, that a surplus was eventually realized, and that the plaintiff had received the share, and more than the share, to which he was entitled, of the assets of the firm. He also says that at and before the time the plaintiff signed the document respecting the \$8,000 before referred to, he, the plaintiff, had full and ample knowledge of the state of the

testator's estate, including the assets of the firm of Burn & Co., and that this document was given voluntarily, and without any coercion or the exercise of any improper influence, and he denies all charges to the contrary of this, and denies all charges of wrongful dealing between him and the defendant Logan. The defendant Burn also says and pleads that there is no privity between him and the plaintiff, and that he is not accountable to the plaintiff, and that he has never refused to account to the defendant Logan, to whom alone he is accountable for his dealings, and he contends that he ought not to be called upon to account to the plaintiff; and he sets up as a further defence that the plaintiff, by his laches and delay, has debarred himself of any rights to the assistance of this Court, as against him the defendant Burn, alleging that the plaintiff was, for fully two years before the commencement of this suit, fully aware of all the facts that he the plaintiff now alleges and relies upon in support of his case.

It is clear that if the document signed by the plaintiff when he received the cheque for \$8,000, is binding upon him, he cannot succeed in this action. The circumstances under which this paper was signed are related by the plaintiff in his evidence, and what is said by the defendant Burn is not I think materially different. The plaintiff says that he was written for to come down for the purposes of a settlement with his father, that he came, that he did not see the books at the time, that he asked for some explanation, that his father told him the books were correct, but that he, the plaintiff, had nothing to do with them; that the conversation with his father was unpleasant and he left the office quickly, that his father said to him "take that cheque or take your chances," and that at the time he made up his mind to take the cheque rather than his "chances," and that he did take it. He says he knew at the time he was not bound to take the cheque and that he could bring his father "to book" (to use his own expression) as he is now doing in this suit. He says that he was not at any time in a position to take money whether he approved of

the terms or not, that he was always in a position to reject an offer if he did not think it was correct. It cannot for a moment be said that the parties, the plaintiff and his father, were on equal terms at the time this cheque was received and the document signed. The father had all the knowledge that any one could have respecting the estate and the transactions he had himself made and the amount he had realized. The plaintiff had not received any statement or account, or even any explanations in regard to the estate or the transactions, or the amount that had been realized, though he asked for explanations and desired to have an account of the estate, and I think it may fairly be said from the evidence and the circumstances disclosed that he had not such knowledge as would place him in a position to be able to make a rational settlement in respect of the estate of which he was really the owner; and I think it was clearly the duty of his father, before making or attempting to make any settlement with him, to give him the fullest possible information regarding the estate and his dealings with it, if even in such case a settlement could, in the face of the other circumstances appearing, be said to be binding upon the plaintiff. Then the plaintiff came of full age on the 10th of July, 1879, and this alleged settlement was on the 16th of November, 1880, one year and about four months afterwards. The father seemed to have the matter altogether his own way, the cheque was apparently ready as well as the document to be signed, the interview was an unpleasant one, and one can scarcely conceive that when the father spoke to the son, the plaintiff, on the subject using the words that I have before referred to, that he did so otherwise than in an angry and threatening manner. I think it a fair conclusion that there was some parental influence that operated on the mind of the plaintiff. I think it appears that an advantage was taken of him by one who had all the necessary knowledge, when he, the plaintiff, had comparatively none, and it does not appear to me to require argument to show that this document or alleged settlement cannot be binding upon the plaintiff.

Then as to the want of privity between the plaintiff and the defendant Burn alleged, and the contention that the suit is improperly brought against him by the plaintiff, in *Williams* on Executors, 8th ed., pp. 20-26 *et seq.*, it is said : "The established rule has been that in ordinary cases, persons who have possessed themselves of the property of the deceased, or debtors to the estate generally, cannot be made parties to a bill against the executors ; for regularly there can be no suit against the debtor, but by the executor, who has the right both in law and in equity. If he even releases and is solvent, neither a creditor nor a residuary legatee can bring any bill against that debtor. There must be collusion or insolvency or some special case. The Court will interfere if there is such special case, as collusion, or insolvency, and then the bill may be brought against both the debtor and the executor. And the general principle on which the debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless collusion insolvency or some special case be shown, has been held to apply equally to the case of a creditor over paid by the executor, that is if there is no collusion or special case, if the executor is not insolvent, he stands the middle man, responsible for the property misapplied by paying a man as a creditor who was not a creditor, as in the other case for the property outstanding in the debtor. But this rule has been relaxed in the case of surviving partners of the deceased ; whom it is allowable to make parties with the executor, in order it is said that the plaintiff may have an account of the personal estate entire. Accordingly in *Bowsher v. Watkins*, 1 Russ. & M. 277, it was held by Sir John Leach, M. R., that residuary legatees might maintain a bill for an account against the executor and the surviving partner of the testator, although collusion between the executor and the surviving partner was neither charged nor proved. But, upon examination of the authorities, it will be found that there is no instance of such a suit being maintained in the absence of special circumstances,

and that collusion is clearly not the only ground on which such a bill can be supported. The cases seem to go to this extent, that such a bill may be supported in all cases where the relationship between the executors and the surviving partners is such as to present a substantial impediment in the prosecution by the executors of the rights of the parties interested in the estate, against the surviving partners."

In the case *Newland v. Champion*, 1 Ves. sen, 105, the Lord Chancellor said: "The general rules are plain that a creditor of the testator or intestate need not make any body but the personal representative a party. At the same time, in this Court, if there are any persons who have possessed the estate, or any debtor of the deceased, and any collusion between them and the representative, they may here, though not at law, follow the assets, and make them parties and demand an account against them, but that is not to be done unless there is some proof of collusion; but I take the case of a partnership to be different, and though there was no suggestion of collusion, yet I do not think the bill would have been demurable to as has been insisted on. Many bills are brought in this Court, not only making the representatives parties, but also any other persons who have possessed the specific assets, and there are many instances where the surviving partner is made a party that they might have an account of the personal estate entire: and if this bill were dismissed it would be to say that this creditor for £1,000 should not have it in his power to check this account of the personal estate of his debtor whose effects are in the hands of Sir George Champion. So that this is a possession of a specific part; therefore, though there is no proof of collusion in this case; and the brother of the wife, who is plaintiff in the first cause, is plaintiff in the second, which might be a presumption of confidence between them; it is proper, and I shall direct an account between the plaintiff, in the second cause, and Sir George Champion."

The case *Gedge v. Trail*, 1 R. & M. 281, n., was a case in which a bill filed by a creditor of a testator against the

executor, and certain persons who were in partnership with the executor, alleged that the partnership claimed to be entitled to retain assets which were in their hands in satisfaction of a debt, which they pretended was due from the testator, but it did not charge in express terms that the executor was colluding with his co-partners. The creditor was held to have, under such circumstances, a right to sue all the partners, and a demurrer by the partners, other than the executor, was overruled. In this case the Vice-Chancellor, Sir John Leach, stated that, in substance, it was collusion on the part of the executor if a stranger retained assets with his consent and approbation, that the bill alleged that all the partners of whom Trail was one retained the sums remitted, and claimed to be entitled to retain them, and that these circumstances amounted to collusion, and brought the case within the exception from the general rule, and the demurrer was overruled.

These are authorities relied on by the plaintiff to support his contention that he is right in bringing his suit against the executor and the defendant Burn, who was, as I have already said, the partner of the testator at the time of his death, the one to whom the power of attorney was given by the executor, and who possessed himself of the whole of the estate of the partnership, the greater part of which belonged confessedly to the testator, and should have come to the plaintiff as legatee under the will. For the defence it was contended that *Bowsher v. Watkins, supra*, and *Gedge v. Trail, supra*, and the other case relied on by the plaintiff were not authorities for making Burn a defendant. *Yeatman v. Yeatman*, 7 Ch. D. 210, was amongst other cases relied on. *Stainton v. The Carron Company*, 18 Bea. 146, and some other case were referred to and also relied on. The contention was that collusion must be shown before a suit of this kind can be maintained, or the circumstances must be such as to present some impediment preventing the executor from suing. Then it was suggested that the defendant Logan might be made a plaintiff in this suit. Defendants' counsel answered that

this could not be allowed, because if allowed the defendant Burn would be deprived of his defences against Logan. If there really were no impediment in the way of Logan suing the defendant Burn, it is, to me, a little difficult to perceive what was meant. Generally a good defence is considered an impediment in the way of a plaintiff in any suit. If it were not for the reliance reposed in the moral rectitude of the defendant Logan (who is, as before stated, a clergymen) and the absence of evidence to shew that he received anything whatever out of the estate, one would be inclined to say that this is a case of collusion. It is certainly a very peculiar case, and one in which there are circumstances of a special character, though perhaps not of the character referred to in *Yeatman v. Yeatman*, *supra*. Perhaps also the language of Sir John Leach, in *Gedge v. Trail*, 1 R. & M. 281 n., when he said "in substance, it was collusion on the part of the executor if a stranger retained assets with his consent and approbation," must be read with reference to the facts of the case then before him, and that for this reason the words employed should not be given their full grammatical meaning when applied to the facts of any other case.

On this subject the cases *Hilliard v. Eiffe*, L. R. 7 H. L. 39, and the cases there referred to, as well as those in the footnotes, amongst which is the case *Consett v. Bell*, 1 Y. & C. C. C. 569, may be looked at. I have not seen that the authorities relied on by the plaintiff for the frame of his suit have been expressly overruled, and I am of the opinion that the plaintiff's contention is, in this respect, sustainable. I also think that the defendants' contention, that the plaintiff is debarred by his own delay, cannot be sustained, and I think the plaintiff is, as against these defendants, entitled to an account of the personal estate of the testator, including his interest in the assets of the partnership, and of the income and profits and losses arising in such dealings, and I think I should now determine the question as to the alleged gift *inter vivos* by the testator to the defendant Burn of one hundred shares of stock.

The defendant Burn says this was a gift made to him by the testator, and he states a reason that was at the time assigned by the testator for making the gift. He says it was not a promise to give at a then future time, but a gift then actually made. I have before stated the facts appearing respecting the transfer, and re-transfer, of the stock, and its appearing on the printed sheet as it did on the 31st of December, 1872. The evidence of the defendant Burn required corroboration under the statute. This transfer and re-transfer of the stock is the only thing offered as corroboration. It makes partly for and partly against, on the whole, I think, against the contention that the gift was made, and I think it cannot be considered such corroboration as is required by the statute. In saying that I do not desire to be understood as reflecting upon the testimony of the defendant Burn, but only dealing with the facts and the statute. I am of the opinion that the alleged gift cannot be sustained upon the evidence given of it.

Then as regards the income or profits in the dealings with the capital of the estate, these should be apportioned in accordance with the amounts of such capital owned respectively by the testator and the defendant Burn. It was contended, and, I apprehend, correctly that there should be certain directions in this respect as to the manner of the taking of the account. The plaintiffs' counsel was willing to put the whole capital at the time of the testator's death at \$18,000. I have already said that the defendant Burn, in his evidence, said that it was \$18,147.72 if the stock could have been sold for what it had cost, but he said it could not, assigning as a reason that putting so large an amount of the stock upon the market at one time would decrease its market value for the time then being. Other witnesses competent to testify on this subject said this also, but it must be borne in mind that the plaintiff was entitled, if this stock had been sold at or soon after the death of the testator, to have it sold in a reasonable and prudent manner. I think placing the

whole capital at \$18,000 is not unreasonable or unfair towards the defendant Burn. I think it is about what the evidence shows was the actual capital. Then to what proportion of the capital was the defendant Burn entitled? He says the capital was carried in the books and balance sheets, before the partnership and afterwards, to the death of the testator at \$11,500. The plaintiff's counsel is willing that the half of the increase above this sum should be considered capital of the defendant Burn, which would leave capital of the testator \$14,750, and capital of the defendant Burn \$3,250, and, so far as I can perceive, this is as favorable to the defendant Burn as I could make it for him on the figures and the evidence, and I think that in taking the accounts these sums should represent the respective proportions of the capital, and that the profits should include all those profits that accrued by "carrying" (so to speak) the Dominion Bank stock and also the gains and profits that arose by the allotment of new stock to which I have before referred, and I think the gains and profits arising in any of these ways or out of any dealings with the capital should be divided according to these respective sums, or proportions of the capital, and that the order of reference should contain a direction to this effect.

In taking the accounts the defendants should have credit for the \$8,000 paid the plaintiff, and for all the moneys paid to or for the plaintiff, regard being had to the liability of the father to support and maintain the plaintiff whilst he was an infant under twenty-one years of age, and the defendant Burn should be allowed a liberal remuneration for his exertions, care, time, and trouble in the management of the estate. The evidence shows that in the way he did manage it he did it skilfully and successfully, and I think the order of reference should contain directions to this effect.

Should it turn out that the plaintiff has been over paid he will, of course, have to refund, but this is, I apprehend, matter on further directions.

Administration is asked, but as there is no legatee but the plaintiff and the defendant Logan for the sum of \$100 only, and as there appear to be no debts unpaid, this would be perhaps identical with the accounts above referred to, so far as accounts are concerned, yet it may be ordered with the above directions in taking the accounts to be applied so far as applicable.

The venue seems to be Toronto, and the reference will be to the Master in Ordinary. Usually costs are ordered up to and inclusive of the judgment or decree. But in this case the plaintiff has, and has for some time had a large amount of the funds in his hands, and I think the costs of the suit may be reserved.

Further directions and all costs reserved till after report.

A. H. F. L.

[CHANCERY DIVISION.]

SMITH v. THE PORT DOVER AND LAKE HURON RAILWAY COMPANY.

Railway—Amalgamation—Receiver—44 Vic. c. 69, O.

The plaintiff, on behalf of himself and all other creditors of the P. D. and L. H. railway company, brought this action against that company, upon a judgment obtained by him against it, and claimed the appointment of a receiver. After the commencement of this action the P. D. and L. H. company was by 44 Vic. c. 69, O., which came into force on March 4th, 1881, amalgamated with two other railways under the name of the L. E. railway company, and by the Act it was provided that the assets of each of the constituent railways should respectively continue liable to satisfy all claims against each of the said railways, so amalgamated, and the future assets of the L. E. company should be applicable to satisfy claims against each of the constituent railways respectively, in the proportion that the line of the particular company against which a claim existed, bore to the whole line, but the assets of one company were not to be applied to satisfy claims against another, and all claims were to be postponed to the claims of bondholders of bonds issued under the provisions of the Act. The plaintiff, thereupon, amended his claim, and asked for a receiver to receive the revenues, profits, and income, of the portion of the L. E. railway, formerly belonging to the P. D. and L. H. railway company. On April 22nd, 1881, the L. E. railway company entered into an agreement with the G. T. railway company, which had since been acted upon, whereby the L. E. company agreed to mortgage a certain portion of its line to secure an issue of first and second mortgage bonds, which were to be apportioned among the various constituent railways, and to be applied as therein specified, and the G. T. railway was to have possession and work the L. E. line for twenty-one years, and to pay as the L. E. company should direct, 25 per cent. of its gross receipts, and the G. T. company was to keep and deliver to the L. E. company half-yearly accounts of the receipts of the line from all sources. There were, also, certain provisions for securing the payment of interest on the above mentioned mortgage bonds, though it was admitted that the sums paid since the agreement, had not been sufficient to pay such interest.

Held, that, under the circumstances, it was not proper to appoint a receiver, for it was not a case in which, when all things were considered, it could be said that any good could probably result from such appointment.

IN this action the plaintiff, on behalf of himself and all the other creditors of the Port Dover and Lake Huron Railway Company, sued that railway and certain other defendants, claiming the appointment of a receiver to receive the revenues of the railway.

The facts of the case and the arguments of counsel are set out in the judgment.

The action was tried on May 20th, 1882, at Woodstock, before Ferguson, J.

Ball, Q. C., and W. Cassels, for the plaintiff, cited *Fox v. The Toronto and Nipissing R. W. Co.*, 26 Gr. 352; *Simpson v. The Ottawa and Prescott R. W. Co.*, 1 Ch. Ch. 126.

C. Moss, Q. C., and Bird, for the defendants, cited *Farquhar v. The City of Toronto* 12 Gr. 186; *In re Cowan's Estate*, *Rapier v. Wright*, 14 Ch. D. 638; *Bouch v. Sevenoaks, etc., R. W. Co.*, 4 Ex. D. 133; *Leaming v. Woon*, 7 A. R. 42.

W. Cassels, in reply, cited *Peto v. The Welland R. W. Co.*, 9 Gr. 455; *Cupit v. Jackson*, 13 Price 721; *Re Manchester and Milford R. W. Co.*, 14 Ch. D. 645.

July 10th, 1884. FERGUSON, J.—On the 15th day of October, 1877, the plaintiff recovered a judgment against the defendants, the Port Dover and Lake Huron Railway Company, for the sum of \$5,109.70 damages and costs, upon a promissory note, the consideration for which was coal supplied by the plaintiff to them, and, as the plaintiff alleges, this coal was used for the construction and working of their railway. The plaintiff now sues on behalf of himself and all the other creditors of the company. The action as originally brought was against this company and Gilbert Moore, Henry Parker, Thomas John Clarke, Ephraim Cook, Samuel Street Fuller, Wallon Marshall, John Jackson, William Merritt, and Daniel Tisdale, making various charges against these defendants as officers and directors of the company, and against the company. It was brought upon this judgment, the plaintiff having placed his executions upon the judgment in the hands of several sheriffs, and failed to realize upon them, and the plaintiff claimed, amongst many other things, an account of the dealings and transactions of the company, and of certain dealings and transactions between the company and certain of the other defendants, and amongst some of these other defendants, with the view of realizing the

amount of his judgment and executions. When the case first came on for trial, it was deemed defective for want of parties. It stood over for the purpose of an amendment in that respect, and the plaintiff accordingly amended his pleading by making the Grand Trunk Railway Company of Canada and the Grand Trunk, Georgian Bay, and Lake Erie Railway Company additional parties defendants, and all these defendants duly filed their statements of defence.

When the cause came up for trial, it was agreed amongst counsel that the action should be dismissed as against all the defendants except the three railway companies, without costs ; and it was accordingly dismissed as against those defendants, that is, all the defendants other than the railway companies. The plaintiff then withdrew all claims for relief against these three railway companies, or any of them, except for the appointment of a Receiver. Papers containing admissions of the plaintiff and of the defendants were put in, the admissions in which will be referred to hereafter. No evidence was offered other than these admissions and the documentary evidence.

By the Act 44 Vic. ch. 69, O., the Port Dover and Lake Huron Railway Company, the Stratford and Huron, and the Georgian Bay, and Wellington Railway Companies were amalgamated under the name of the Grand Trunk, Georgian Bay and Lake Erie Railway Company. By the 3rd section of this Act, it was provided that all the rights claims, property and effects of the companies thereby amalgamated should be vested in the company (meaning the Grand Trunk, Georgian Bay, and Lake Erie Company) subjected to the provisions of the Act. The 4th section of the Act is as follows :

4. "The assets of each company hereby amalgamated, including a share of any future assets of the company, which may have been earned by that portion of the line of the company hereby amalgamated in the proportion the length of the said portion of the line of the company hereby amalgamated, and which is then completed, and against which any lien or claim exists or may exist, bears to the whole length of the line of the company so far as completed, notwithstanding they are vested in the company by this Act, shall continue liable to satisfy all liens and

claims against that company hereby amalgamated which was originally liable therefor or thereto, and shall be applied in such satisfaction, but, no other assets of the company shall be applied, nor shall the assets of one company hereby amalgamated be so applied in satisfaction of any lien and claim against the other, provided that all suits to enforce any such lien or claim shall be brought and taken against the company ; and all actions suits, and proceedings by or against any company hereby amalgamated, and pending at the time of the passing of the Act, shall be continued by or against the company : Provided also, that the rights of any person or party having any special lien, charge or privileged claim upon the lands, buildings, tolls, or other property of any of the companies hereby amalgamated, or upon any part thereof, shall not be affected, save that they and all the liens and claims mentioned in this section shall be subject to the provisions contained in this Act *regarding the issue of bonds by the company.*"

The interpretation clause of the Act shows that the words "the company" mean the company incorporated by the Act, and the words the "companies hereby amalgamated" mean the Port Dover and Lake Huron, the Stratford and Huron, and the Georgian Bay and Wellington Railway Companies, and the words "company hereby amalgamated" means such one of the last named railway companies as the context may point out.

From these sections it appears that, notwithstanding the amalgamation, the assets of the Port Dover and Lake Huron Company, including a share of future assets of the Grand Trunk, Georgian Bay, and Lake Erie Company, proportioned as in the 4th section provided continued liable to satisfy all liens and claims against them (The Port Dover and Lake Huron Company) subject to the other provisions contained in this 4th section, the most important one of which seems to be that in regard to the issue of the mortgage bonds provided for by section 35 of the Act.

This Act was assented to on the 4th day of March, 1881, and long after the commencement of this suit, which, as originally framed, asked, amongst other things, for an appointment of a receiver, to receive the revenue and tolls of the road of the then defendant company (The Port Dover and Lake Huron Company), and as amended at the time of the amendment by adding parties defendants

asked for the appointment of a *Receiver to receive the revenue and profits and the income of the portion of the road formerly belonging to the Port Dover and Lake Huron Company.*

On the 22nd day of April, 1881, an agreement was made between the Grand Trunk, Georgian Bay, and Lake Erie Railway Company and the Grand Trunk Railway of Canada, which recites some former agreements, and contains various provisions respecting, amongst other things, the completion of the construction of the road, the working of the same, the issue of the bonds authorized by the Act, and the financial management of the concern, including provisions respecting the payment of the interest on the bonds.

At the trial, it was admitted that a certain agreement of the 10th day of April, 1880, and the agreement above mentioned of the 22nd day of April, 1881, were legally and properly entered into, and duly and properly executed : that the Grand Trunk Railway Company took over the Port Dover and Lake Huron Railway, and the portion of the Stratford and Huron Railway then completed on the 26th day of May, 1880, under the first lease (the agreement of the 10th of April, 1880, I apprehend,) and worked the same thereunder until the adoption of the agreement of the 22nd of April, 1881 ; and that since that time they have continued the operation of the parts they first took over, and have taken over an additional part of the Stratford and Huron Railway, and the whole of the Georgian Bay and Wellington Railway, and have since then operated these under the agreement of the 22nd of April, 1881.

In this agreement of the 22nd of April, 1881, the Grand Trunk, Georgian Bay, and Lake Erie Railway Company is called the "Lake Erie Company," and the Grand Trunk Railway of Canada is called the "Grand Trunk Company," and the 17th clause of it is as follows :

"That the Lake Erie Company shall create a first mortgage upon the whole of the line from the village of Port Dover to the town of Durham, both places included, and from the connection of that part of their line formerly of the said Georgian Bay and Wellington Railway Company with

that part of their line formerly of the said Stratford and Huron Railway Company, near the town of Palmerston, to the termination of the line at Colpoys Bay, and including the company's works at that point, to secure an issue of first mortgage bonds of the Lake Erie Company for \$727,500 ; which shall bear interest at the rate of five per cent. per annum, and the said issue of first mortgage bonds shall be apportioned in manner following , that is to say :

“ In respect of the said Port Dover and Lake Huron Railway Company, \$227,500 of said first mortgage bonds.

“ In respect of the said Stratford and Huron Railway Company \$323,700 of said first mortgage bonds.

“ And in respect of the said Georgian Bay and Wellington Railway Company \$160,300 of the said first mortgage bonds.”

The 18th clause provided that the Lake Erie Company should create a second mortgage on their line of railway between the same points covered by the first mortgage, to secure an issue of second mortgage income bonds of the Lake Erie Company to the extent of \$782,500, bearing interest at five per cent. per annum, and that these bonds should be apportioned, \$180,000 to the Port Dover and Lake Huron Company, \$307,300, to the Stratford and Huron Company, \$70,200 to the Georgian Bay and Wellington Company, and as regards the residue of such second mortgage income bonds, being \$225,000 that these should be set aside for an enlargement and extension fund, and should be placed, held and applied in the manner and for the purposes mentioned in the 14th, 15th, and 16th clauses of the agreement.

By the 20th clause of the agreement the proportion of the first mortgage bonds, and second mortgage income bonds allotted in respect of the Port Dover and Lake Huron Company, were to be used and applied to get in, absorb, and extinguish all the outstanding bonds of this company.

By the 21st clause the proportion of these bonds allotted in respect of the Stratford and Huron Company, was to be used to get in, absorb, and extinguish all the outstanding bonds of this company, and the balance not required for that purpose were to be delivered to Messrs. Clarke, Tisdale & Co., the contractors, for the extension of the road, or to whom they should appoint.

And the proportion of these bonds allotted in respect of the Georgian Bay and Wellington Company were to be used and applied, and handed over as Joseph Hickson, the General Manager of the Grand Trunk Company, should direct.

The Grand Trunk Company were to have possession of the line of railway of the Lake Erie Company, with all its works and appliances of all kinds, for and during the term of the agreement, which was twenty-one years from its date, and were to provide the necessary locomotive engines, cars, and other rolling stock requisite for the purpose of properly working the line, and were to work the traffic both freight and passenger, and to develop the same by all reasonable means in their power; and by the ninth clause of the agreement the Grand Trunk Company were to pay to such person as the Lake Erie Company should designate, until the Lake Erie Company should have issued the bonds and given notice to the Grand Trunk Company, and after such issue and notice into the bank or banking house, or other place where the bonds should be made payable, to be applied in or towards the payment, as the case might be, of the interest upon the bonds to the extent by the agreement provided half-yearly, on the first day of February, and the first day of August in each year, during the continuance of the agreement, twenty-five per cent of the gross receipts from all sources on the railway computed after the deduction from the whole gross receipts of all "paid on's," rebates, cartages, and allowances, as well as such other deductions as might under the usual custom of railway companies be deducted from gross receipts, provided that as soon as this twenty-five per cent should exceed the sum of \$187.50 per mile per annum, on the mileage completed and accepted by the Grand Trunk Company from time to time, the surplus of the said twenty-five per cent over the said \$187.50 should be divided into two equal parts, one of such parts to be retained by the Grand Trunk Company, and the other to be paid over with the said \$187.50. The said surplus, if any, to be ascer-

tained and fixed at the end of each year in rendering the accounts for the last half of each year.

By the 12th clause of the agreement, the Grand Trunk Company were to keep accurate accounts of the receipts of the line from all sources, such accounts to be made out to the end of each half year ending the 30th of June, and the 31st of December in each year, and such accounts were to be rendered and delivered to the Lake Erie Company two months after the said dates respectively.

It was admitted that the bonds were all duly issued in accordance with the agreement and the Act, and notice thereof duly given to the Grand Trunk Company, that they had been delivered according to the agreement, and the old bonds were redeemed pursuant to the provisions of the 36th section of the Act.

It was also admitted that the contractors and the original bondholders of the Stratford and Huron Company, and of the Georgian Bay and Wellington Company, had sold all the bonds they were entitled to and had received under the agreement, and that the Port Dover and Lake Huron Railway bondholders had sold and disposed of all the bonds held by them, except to the extent of about £5,000 of first mortgage bonds, and £9,000 of second mortgage bonds, and that previous to the time of the making of the first agreement the Port Dover and Lake Huron Railway was being worked by the bondholders, and had been so worked from the 9th day of October, 1877, to the 10th day of March, 1880, for their own benefit, with the consent of the shareholders, on account of the interest on the bonds not having been paid; that there were several years interest unpaid, and a large deficit left unpaid for operating expenses to be provided for, together with preferred claims for right of way which had remained unpaid; that the three companies were duly and properly amalgamated under the Act, and that the sums paid since the making of the agreements (leases) have not been sufficient to pay the interest on the first and second preference bonds.

By the 23rd clause of the agreement it was provided that, with the view of securing the interest payable on the issue of \$727,500 of five per cent. first mortgage bonds, the Grand Trunk Company should, if in any half year the said percentage of the gross receipts payable to the Lake Erie Company should be less than \$18,187.50, by way of rebate out of the receipts accruing upon the Grand Trunk Railway proper on all traffic interchanged between the Lake Erie Company and the Grand Trunk Company, allow sufficient to make up the said percentage to the said sum of \$18,787.50, that being the amount of the interest at five per cent. on the \$787,500 of first mortgage bonds for each half year, with a provision that this should apply only proportionately to \$500,000 of such first mortgage bonds until the completion by the Lake Erie Company and acceptance by the Grand Trunk Company of the line to Colpoys Bay ; and it was admitted that the amount of rent received from the Grand Trunk Railway Company, under the agreement of the 18th of April, 1880, was \$16,510.45, which was applied by the bondholders of the Port Dover and Lake Huron Company for working expenses not covered by the receipts from the road while operated by them, and that the amount received by the amalgamated company from the Grand Trunk Company under the agreement of the 22nd April, 1881, was \$16,326.65, which sum the Grand Trunk Company paid direct to the bond-holders, and that the facts of the receipt by the Grand Trunk Company and payment by them to the bondholders have been entered in the books of the amalgamated company, no other accounts being kept by them in connection therewith.

There are, of course, many other provisions in the agreement of the 22nd of April, 1881. Those that I have referred to are, however, the ones that I think material and necessary to be mentioned here. It was decided in the case *Peto v. The Welland R.W. Co.* 9 Gr. 455, that a judgment creditor of a railway company, with an execution against the lands of the company lodged in the hands of the sheriff,

is entitled to the appointment of a receiver of the earnings of the road, the profits thereof to be applied in payment of his demand. The reasons why this relief is given instead of what is the ordinary remedy of an execution creditor are fully and, I think, very clearly stated in the judgment in that case.

It is admitted in this case that the plaintiff has upon his judgment executions against goods and lands in the hands of the sheriffs of the Counties of Oxford and Norfolk respectively, and that his judgment is wholly unsatisfied.

In the case *Simpson v. The Ottawa and Prescott R. W. Co.*, 1 Ch. Ch. 126, a receiver had been appointed under an order of the Court of Appeal, and was a "receiver of the rents, issues, and profits of the railway," and the question was, whether he was entitled to receive, and it was his duty to receive the gross receipts of the company for the earnings of passengers, freight, the mails, and the like, or only the surplus that might remain after paying the expenses of the company. The late Chief Justice Spragge, then Vice Chancellor, in the course of his judgment, said : "I agree that where the Court cannot interpose usefully it should not interfere at all, and that it should interfere only so far as it can interfere usefully. I think, therefore, that if the payment into the hands of the receiver of the gross receipts of the company be incompatible with the working of the company, then he should be restricted to the receipt of the surplus after payment of the necessary expenses of the company. But unless this be shewn, and shewn clearly, I think that the gross receipts should be paid to the receiver. It affords, no doubt, to the creditor a better security that all that is available shall reach his hands, than if a surplus to be ascertained by the company's own officers were to be paid over. In fact, if that were the only duty of a receiver, that is to receive the surplus and pay it over, *cui bono* appoint him at all ; the creditor would probably derive as much benefit from an order on the company to pay into Court from time to time the balance in hand, to be verified by affidavit."

It was objected on the part of the defendants that the bondholders were not before the Court. It was stated by the plaintiff's counsel in answer to this objection, that the matter had been determined by the Chief Justice when the cause was before him, and I think that I must assume this to be so, and that the suit is at present properly constituted in this respect.

It was argued on behalf of the plaintiff that it had also been determined by the Chief Justice that the case is a proper one for the exercise of the discretion of the Court in favour of the appointment of a receiver, but I do not see how this can be made out, and I think that so far as it is a matter of discretion, that discretion has to be exercised now.

It was not contended on behalf of the plaintiff that a receiver, if appointed, would have the right to receive, or that a receiver should be appointed for the purpose of receiving the moneys of the Grand Trunk Railway Company, who are operating the road, but only to receive the moneys payable by that company, which were necessarily fluctuating in amount, and that although the present outlook was not encouraging, yet that it might be that the future receipts would be such that creditors of the Port Dover and Lake Huron Company would be paid, and that a receiver, though he would not receive any of the moneys of the Grand Trunk Company, would have a right to investigate their accounts, and in his office as a receiver, would be of vital importance to these creditors by affording them such a protection as would probably, in a shorter time than otherwise, create a surplus applicable to the payment of their debts, and that the bondholders, if their interest were in arrear, would have the right to name a receiver, but that, nevertheless, the plaintiff was and is entitled to have one.

For the defence, it was contended that the plaintiff's only remedy was against the Port Dover and Lake Huron Company, and that the 4th section of the Act of Amalgamation confined the plaintiff's right to the property of this

company, and that there could not be a receiver appointed to receive all the moneys to be received by the amalgamated company from the Grand Trunk Company, and that there could not be a receiver under the existing circumstances who could possibly do any good. Reference was also particularly made to the 9th clause of the agreement, whereby the Grand Trunk Company had become bound, after the issue of the bonds and notice to them, to pay the twenty-five per cent. of the gross receipts after making the deductions therein mentioned into the bank, banking house, or other place where the bonds are made payable, in or towards payment, as the case might be, of the interest upon the bonds; and amongst many other things, it was contended on the part of the defence, that if money came into the hands of the amalgamated company, constituting a debt due to the Port Dover and Lake Huron Company, it might be attached by the plaintiff, and that this would be the earliest time at which the plaintiff would be entitled to a remedy, and this remedy he would have if the circumstances were to arise.

It was contended that the plaintiff was entitled to a receiver at the time of the commencement of his suit, and that he is still entitled to one, the Act and the agreements referred to having come into existence *pendente lite*. By his admissions, however, he recognizes—to put it shortly—all that was done as having been legally and properly done, and I find them before me as existing things to be taken into consideration and dealt with in deciding as to whether a receiver should or should not be appointed.

In *Kerr*, on the Practice as to Receivers, 2nd ed., p. 8, it is said that the order appointing a receiver should state distinctly on the face of it over what property the receiver is appointed, (referring to *Crow v. Wood*, 13 Beav. 271,) or else refer to the pleadings or some document in the cause which describes the property (referring to *Seaton on Decrees*, p. 424.) I think it clear that a receiver should not be appointed whose duty it would be to receive the moneys that are payable, or to be paid over by the Grand Trunk

Company. They are payable to or for the benefit of the amalgamated Company with whom the Grand Trunk Company made their contract, and not to the Port Dover and Lake Huron Company, who are the debtors to the plaintiff, and the others on whose behalf he has sued. It is not contended that a receiver can be appointed to receive the earnings of the road of the amalgamated company worked by the Grand Trunk Company. By the 4th section of the Act, the claim of the plaintiff upon the assets, present and future, in that section mentioned of the Port Dover and Lake Huron Company is postponed to claims of the bondholders of the bonds issued under the provisions of the Act, and I cannot see my way to appointing a receiver in respect to those assets under the circumstances that have been disclosed.

I do not think the case *In re Manchester and Milford R. W. Co.*, 14 Ch. D. 645, referred to by the plaintiff, deciding that under the 4th section of the Railway Companies' Act, 1867, whenever a judgment creditor of a railway company is unpaid, the appointment of a receiver or manager is a matter of right, has any application to this case. The evidence required in support of an application under that section (which gave new rights) by a judgment creditor for the appointment of a manager, is an affidavit that he is such judgment creditor, and that his judgment is unsatisfied, and that the company is a going concern carrying on its own business, and conducting its own traffic in the ordinary way. The facts here would not warrant the making of such an affidavit, even if the law here were the same as that under which that case was decided.

I have not been referred to any case in which a receiver has been appointed under circumstances that appear to me at all like the circumstances of this case, and after much anxiety and perplexity I have arrived at the conclusion that I should not make the order appointing a receiver. I think it is not a case in which, when all things are considered, it can be said that any good would probably result from the appointment of one. I do not think the Court

can in this respect act usefully, and in the view of the late Chief Justice it should not in that case act at all. The appointment of a receiver being the only relief now asked, the action will be dismissed. As to the costs, the defendants against whom most of the charges were made by the plaintiff consented to a dismissal of the action without costs. The case is one of great hardship upon the plaintiff, and I think that under all the circumstances the dismissal should be without costs.

Action dismissed, without costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF ELDERSLIE V. THE CORPORATION OF THE VILLAGE OF PAISLEY.

Municipal law—New municipality—Liability for share of debts created by old municipality—Payment to wrong person—Statute of Limitations—Unproductive judgment—36 Vic. ch. 48, secs. 9, 11, 27, 56, O.

The township of E., the present plaintiffs, in 1873, passed a by-law for issuing debentures to raise \$8000, for the purposes of a certain school section, in part comprised in it, and in part in the township of G., and providing for payment of interest, and creation of a sinking fund, and levying of the necessary special rate on the property of the school section. In 1874 the village of P. was incorporated out of a portion of the township of E., being a portion of the said school section, and during the currency of the debentures the corporation of P. collected their share of the moneys, on the requisition of the secretary-treasurer of the school board, and paid over the same to that official, instead of to the treasurer of the township of E., which township never made any requisition on the village of P. to collect the moneys, and itself paid over the moneys collected by it to the secretary-treasurer of the school board. In 1883 the said secretary-treasurer died, and it was found he had converted the sinking fund money to his own use, and had left no assets wherefrom it might be made good.

In the same year the debentures fell due, and the township of E. paid them and now sued the village of P. for its *pro rata* share thereof.

Held, that having regard to 36 Vic. ch. 48, sec. 56, O. (R. S. O. ch. 174, sec. 55), the plaintiffs were entitled to judgment, except as to sums levied and received by the defendants more than six years before action brought, for the defendants should have paid the moneys over to the treasurer of the plaintiffs' corporation; and even if there had been a positive agreement by and with the township of E., that the money should be paid to the secretary-treasurer of the school board, this would have made no difference; for such an agreement would have been *ultra vires* the township of E., and void as contrary to the statute law, while the sections of 36 Vic. ch. 48, relating to arbitrations in cases of separations of incorporated villages from townships, did not apply in this case, so as to prevent the action lying.

Held, also, that even if it was impossible to make the judgment productive on the ground that the defendants could not now levy and collect the money, this was no reason why the plaintiffs should not obtain judgment.

The Corporation of the County of Frontenac v. The Corporation of the City of Kingston, 30 U. C. R. 584, distinguished.

THIS was an action brought by the corporation of the township of Elderslie to compel the corporation of the village of Paisley to pay over a certain sum alleged to be due from the latter in respect of certain debentures which had been issued by the plaintiffs under a by-law previous to 1873, when the village of Paisley separated from the

township of Elderslie, the whole of the principal money of which the plaintiffs had paid when the same became due.

The facts of the case and the arguments of counsel sufficiently appear from the judgment.

The action was tried at Walkerton, on October 27th, 1883, before Ferguson, J.

W. Cassels, Q. C., and O'Connor, for the plaintiffs, referred to 36 Vic. ch. 48 (O.) sec. 55, 56; 37 Vic. ch. 28 (O.) secs. 46, 51, 53; R. S. O. ch. 174, sec. 11; *Scott v. Trustees of Union School, Bathurst*, 19 U. C. R. 28; *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 U. C. R. 584; *Stratton v. Metropolitan Board of Works*, L. R. 10 C. P. 76; *Haynes v. Copeland*, 18 C. P. 150; *The King v. Carpenter*, 6 A. & E. 794; *McCracken v. City of San Francisco*, 16 Cal. 591; *Dillon on Mun. Corp.*, 3rd ed., secs. 135, 137.

C. Moss, Q. C., and Shaw, Q. C., for the defendants; referred to C. S. U. C. ch. 64, sec. 35; 37 Vic. ch. 28, sec. 46, subs. 7, O.; 43 Vic. ch. 32, sec. 3, O.; *In re The Board of School Trustees of Toronto v. The Corporation of the City of Toronto*, 23 U. C. R. 203; *Re Board of Education of Napanee v. The Corporation of the Town of Napanee*, 29 Gr. 395; *Polak v. Everett*, 1 Q. B. D. 669; *Potts v. The Corporation of the Village of Dunnville*, 38 U. C. R. 96; *Clarke v. Village of Palmerston*, 6 O. R. 616; *Kennedy v. The Municipal Council of the Township of Sandwich*, 9 U. C. R. 326; *School Trustees of the Township of Hamilton v. Neil*, 28 Gr. 408; 45 Vic. ch. 30, (O.) sec. 5; R. S. O. ch. 174, secs. 9, 27, 386; *ib.*, ch. 204, sec. 104, subs. 10, sec. 150; *Grier v. Plunket*, 15 Gr. 152.

W. Cassels, Q. C., in reply, referred to *Bigelow on Estoppel*, 3rd ed., pp. 484, 519; *The Municipal Corporation of the Township of East Zorra v. Douglas*, 17 Gr. 462.

September 4th, 1884. FERGUSON, J.—Union school section No. 1 of the township of Elderslie and Greenock consisted of a part of each of the said townships, and the

school-house therein was and is situated in the part of the school section formerly in the township of Elderslie, but now in the village of Paisley.

The trustees of the school section applied to the township of Elderslie for authority to borrow the sum of \$6000, for the purpose of erecting a school house and paying for a school site; and on the 3rd day of March, 1873, a by-law was passed by the corporation of the township of Elderslie, granting the authority applied for.

On the same day another by-law was passed by the corporation of Elderslie authorizing the issue of their debentures for the amount payable in ten years from the 1st day of March, 1873, with coupons for the payment of the interest at six per centum per annum, payable on the 1st day of March in each year, and providing for the levying of the necessary special rate on the property in the school section for the payment of the interest and creating a sinking fund for the payment of the principal.

The loan was effected by the trustees. The debentures were duly issued and delivered to them; and they, the trustees, sold the debentures to the Canada Life Insurance Company and received the proceeds of the sale.

Afterwards, and on the 1st day of January, 1874, the village of Paisley became incorporated, and was formed out of a portion of that part of the township of Elderslie, which was included within the limits of the said school section, so that the school section or division was thereafter as it appears composed of a part of the township of Elderslie, a part of the township of Greenock, and the village of Paisley.

The township of Elderslie levied, collected, and paid over to the secretary and treasurer of the school section the interest and the amount required for the sinking fund for the year 1873. For each of the years from 1874 to 1882, both inclusive, the township of Elderslie, in the part of the school district not included within the limits of the village of Paisley, and included in the township of Elderslie, and the village of Paisley within the limits of the said village,

each on the requisition of the secretary and treasurer of the school board of the district, levied all money required by the said board. This is the form of an admission made at the trial, and it was also admitted that no special column ever appeared in the collector's rolls of the township of Elderslie for any year specifying the rate which was to be collected to pay the interest, and provide a sinking fund to meet the debentures. It was admitted that these moneys were collected by the respective collectors, and that the respective treasurers of the township of Elderslie and the village of Paisley paid over the moneys so collected to the secretary and treasurer of the said school board.

It was admitted that the municipal council of the township of Elderslie had each year knowledge of the requisitions made upon the township by the secretary and treasurer of the school board above mentioned, that the council of the village of Paisley had each year the like knowledge in respect of the requisitions made upon that village, and that the moneys so collected and paid over by the respective treasurers of the township of Elderslie and the village of Paisley actually included the moneys required to be collected to meet the debentures and interest.

It was admitted that no requisition was made by the township of Elderslie to the village of Paisley to levy and collect the moneys to pay interest and provide for a sinking fund in respect of the debentures.

It was admitted also that after the separation of the village of Paisley from the township of Elderslie, the village and the township had a settlement of assets and liabilities, and that the township paid to the village in pursuance of such settlement the sum of \$625, in the year 1874, this being the amount found due (or rather agreed upon) by the settlement. The admission, however, reserved the rights to the village of Paisley to give evidence to shew that this settlement had no connection with or reference to the matters of these debentures, the subject of this action, and upon the evidence I think it plain that this matter was not included in the settlement.

It was stated at the Bar that the township of Greenock levied and paid over its proportion of the moneys in respect of these debentures in the same way to the secretary and treasurer of the school board, and there is no reason to doubt such is the fact, though it may have no material bearing on the questions in this suit.

It appears that the secretary and treasurer of the board paid the interest on the debentures regularly, or nearly so, up to the time of his death, which happened in the early part of 1883, and that after his death the sum of \$473 was paid out of the moneys received upon an insurance upon his life. This seems to have been the balance of the interest and some other school moneys. But it appears that he appropriated or converted to his own use moneys that were to create the sinking fund for the payment of the principal, and that he died leaving no estate, or none that could be made available for the satisfaction of the moneys so appropriated by him.

The debentures fell due in March, 1883. Payment of the amount was demanded. There was no money to meet the demand, and the corporation of the township of Elderslie bring this action against the corporation of the village of Paisley, and ask that an account may be taken of the proper share to be borne by the defendants in respect of the principal and interest of the debentures, and that the defendants may be ordered to pay the amount thereof to the plaintiffs. They also ask general relief and costs.

The application to the plaintiffs by the trustees for the authority to borrow the money was, I think, as stated by counsel for the defence, made under the provisions of 22 Vic. ch. 64, sec. 35, (C. S. U. C. p. 738.) Before the defendants became incorporated and set apart from the township, the Municipal Act 36 Vic. ch. 48, O. was passed. By the 53rd section of that Act, it was provided that, "In case of the erection of any locality into an incorporated village * the village * * shall remain subject to the debts and liabilities to which such locality was previously liable in like manner as if the same had been contracted by the new municipality."

By section 56 of the same Act, it is provided as follows : " All assessments imposed by the council of the then corporation for the year next before the year in which the new corporation is formed by separation therefrom, shall belong to the then corporation, and shall be collected and paid over accordingly, and after the separation *all special rates for the payment of debts* theretofore imposed upon the locality by any by-law of the former corporation, shall continue to be levied by the new corporation, and the treasurer of the new corporation shall continue to pay over amounts as received to the treasurer of the senior or remaining municipality, and the latter shall apply the money so received in the same manner as the money received under the same by-law in the senior or remaining municipality." Counsel for the plaintiffs relied upon those provisions as shewing that the treasurer of the defendants, instead of paying the moneys year after year to the secretary and treasurer of the school board, should have paid them to the treasurer of the plaintiffs, saying that if the moneys had been so paid to the treasurer of the township of Elderslie, the sinking fund would have been created and the moneys forthcoming for the payment of the debentures when they became due. Reference was also made to section 296 of the same Act, now R. S. O. ch. 174, sec. 386: " All debentures and other instruments duly authorized to be executed on behalf of a municipal corporation shall, unless otherwise specially authorized or provided, be sealed with the seal of the corporation, and signed by the head thereof, or by some other person authorized by by-law to sign the same, otherwise the same shall not be valid. And it shall be the duty of the treasurer of the municipality to see that the money collected under such by-law is properly applied to the payment of the interest and principal of such debentures."

The by-law under the authority of which the debentures were issued recited (amongst other things) that the sum of \$960 would be required to be raised annually, by special rate, for the payment of the debentures and interest; and

that, for the payment of the interest and creating a yearly equal sinking fund for the payment of the principal sum a special rate of seven and one-fifth mills on the dollar, in addition to all other rates, would be required to be levied in each year.

It also stated, by way of recital, the value of the whole ratable property in the school section, according to the then last revised assessment roll, the then existing indebtedness of the school section, as is usually done, and that no part of the same was unpaid; and it enacted that, for the purpose of meeting the interest and creating a sufficient sinking fund for the payment of the principal of the debentures, there should be levied and raised in each year an equal special rate of seven and one-fifth mills in the dollar, on all the ratable property in the school section, in addition to all other rates whatsoever.

It was contended for the plaintiffs that by force of the statute the action is maintainable against the defendants, because the moneys in question were moneys that the treasurer of the defendant corporation should, according to the provisions of the Act, have paid over year by year to the treasurer of the plaintiff corporation; and, amongst many other authorities referred to, the case of *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 U. C. R. 584, was relied upon for the contention. This was the chief, but I do not say the only contention on the part of the plaintiffs.

The defendants contended that they had no responsibility in the matter at all; that the debt was incurred for the benefit of the school section, and not for the corporation of Paisley; that the defendants only acted at most as collectors of the money—a sort of statutory instrument of the plaintiffs for the purpose of collection: that the village does not comprehend the whole school section, and that a part of it might have been outside of the limits of the school section, though such is not the fact, and that the action is brought against the wrong party, the defendants having no liability in the matter. It was also con-

tended for the defence that the responsibility is upon the plaintiffs, because the difficulties have arisen entirely by reason and as a consequence of their (the plaintiffs') negligence and misleading conduct by collecting the money in the year 1873, and paying it over to the secretary-treasurer of the school-board, and thereby indicating to the defendants that when they collected they should do likewise ; and afterwards during the whole of the remaining period paying over to the same secretary-treasurer their part of the money, and not in any way objecting to the defendants paying to the same person, though they (the plaintiffs) had during the whole time full knowledge of what was being done year after year with the moneys collected by the defendants ; and further that the plaintiffs in the year 1882, when it was discovered, or at least supposed, that the secretary-treasurer of the board had not properly kept or taken care of the money, demanded security from him which he agreed to give, but did not ; and that for these reasons, as well as others that were urged, the plaintiffs could not recover.

The defendants also contended strongly that they did not receive the money at all, that they only acted as collectors for the plaintiffs, and paid over the money to the person designated by the plaintiffs as the proper person to receive it, saying also, that it was plain from what had occurred, that if their treasurer had paid over the money to the plaintiffs' treasurer, it would have been by him paid to the secretary-treasurer of the school-board, and the matter would have been in the same unfortunate position as that in which it now is. The defendants contended also, that there is nothing in the statutes referred to, or in any other statute contained, which rendered it compulsory upon the collector or treasurer of the village of Paisley to pay over the moneys when collected to the treasurer of the township of Elderslie. The settlement that took place at the time of the separation of Paisley from Elderslie, was also relied upon by the defence.

The Statute of Limitations was pleaded, and it was contended that, if there was any liability of the defendants in respect of these debentures, it arose at the time of the separation, and the period of the statute had run before this action; and it was also contended that even if it were assumed that there is any existing liability of the defendants, it is a matter to be disposed of by arbitration, and not by action. They also urged that any liability there might be rested upon their officers, and not upon themselves.

It was also said that the sureties of the secretary-treasurer of the school-board had been discharged from all liability; and that for this reason there could not be a recovery against the defendants. As to this last, I have in a late case expressed an opinion that the sureties of the secretary-treasurer of the board of trustees of a union school section were not on the form of bond adopted in that case liable in respect of moneys of a like character with the moneys in this case, on the ground that the moneys did not properly come into the hands of the secretary-treasurer by virtue of his office (*a*). I do not know what was the form of the bond in this case, but unless it was of some uncommon form, I would think the sureties not liable in respect of the moneys in question here, and that as a consequence their discharge would not constitute a defence.

I am of the opinion that the provisions of sec. 56, of 36 Vic. ch. 48, apply to the case, notwithstanding the peculiarity of the facts arising upon the separation of Paisley from the township of Elderslie. The special rate for the payment of the debt was theretofore imposed by by-law of the former corporation. It was not imposed upon the exact locality that comprises the village of Paisley, but upon a locality comprehending a larger territory, and embracing the whole of Paisley.

I think that it became the duty of Paisley to levy the special rate of seven and one-fifth mills under the

See Keith v. Fenelon Falls Union School Section, 3 O. R. 194.

by-law, and the duty of the treasurer of Paisley to pay over the money to the treasurer of the township of Elderslie, as stated in that section. I do not see that the fact that the school section embraced a part of the township of Greenock, and might, as was said, have embraced other territory, can make the difference contended for. A special rate was imposed by the by-law, and the amount of it was fixed, and I think the concluding part of the section shews that the "locality" mentioned in the section does not mean the exact locality of the new corporation, for it provides that the treasurer of the senior municipality shall apply the money, when received from the treasurer of the new corporation, in the same manner as the money received under the same by-law in the senior or remaining municipality; and after an examination of the 9th, 11th, and 27th sections of the Municipal Act of 1873, 36 Vic. ch. 48, O., (to two of which I was referred by counsel), I think that the provisions made in respect of arbitrations in cases of separations of incorporated villages from townships, do not apply in this case so as to prevent the maintaining of the action, if in other respects it can be maintained; nor do I think that the officers of the corporation are alone responsible, as was contended by the defence.

As regards the negligence and misleading conduct of the plaintiffs relied upon as a defence, I do not see that the defendants are entitled to place it on stronger (if so strong) ground in their favour than if there had been a direction to pay, or an agreement that the money should be paid to the secretary-treasurer of the school board instead of to the treasurer of the township of Elderslie, the proper custodian of it under the statutes, and in such a case I think the doctrine stated in *Dillon* on Municipal Corporations, 3rd ed. sec. 457, would apply. It is stated in this way: "The general principle of law is settled beyond controversy, that the agents, officers, or even city council of a municipal corporation *cannot bind the corporation* by any contract which is beyond the scope of its power or

entirely foreign to the purposes of the corporation, or which (not being in terms authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators, the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by the statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. * * It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea *ultra vires*, setting up as a defence its own want of power under its charter or constituent statute to enter into the contract." The author then refers to the case of *bond fide* holders of negotiable securities in which the law may be different, but this need not be further pursued here.

It appears to me that the duties of the township of Elderslie and that of its officers were in the case that arose defined duties, which the corporation of Paisley were bound to know, and that the duty of the village of Paisley and those of its officers were also defined duties which the defendants were bound to know, and I cannot see that the negligent or misleading conduct of the plaintiffs can, in view of the doctrine I have just referred to, constitute in the hands of the defendants a good defence. The duty of the defendants, I think, was a duty that they were bound to understand, and I think they cannot excuse themselves for the non-observance or violation of it, by setting up that the plaintiffs' officers or agents were guilty of negligence in the non-observance of their duties, which the defendants were also bound to understand; and I fail to see how the defendants can successfully contend that their treasurer is alone responsible, and thus avoid liability. I think that it appears that the moneys were levied and collected by the defendants, and that they were not paid over by

the treasurer as they should have been. With the responsibility of their treasurer to them I have no concern here. I think, however, that they, the defendants, are answerable for his default or mistake.

I do not think that the fact that no requisition for the levying of this money was made by the plaintiffs upon the defendants, nor the fact that it was levied pursuant to requisitions made by the board of the school section, nor what was stated and admitted respecting there being no special column in the rolls for the township of Elderslie respecting this money, can make any difference in the conclusion. It was the duty, I think, of the defendants to levy the rate. This rate was defined by the by-law. It is substantially admitted that the defendants did levy the money, and it is clear that their treasurer did not pay it over, as he should have done; and, so far as I can see, it matters not, for the purposes of this action, what he did with the money, when he did not do that which the statute required he should do, the money having been lost.

Then how, if at all, can the plaintiffs recover against the defendants?

In the case of *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 U. C. R. 584, Wilson, J., in delivering the judgment of the Court, when referring to 18 Vic. ch. 130, the statute under which that action was brought, says: "The county was then empowered to *demand and recover* from the city a portion of the jury expenses incurred by the county in each year, according to the assessed value of all the rateable property in each: the sum to be borne by the city to be *repaid* by it to the county, and to be *payable* immediately after the close of each year. The assessment rolls to be used were those of the year in which the expenses to be divided between them were incurred. The city was empowered and required to raise by assessment such money which it required for the purposes of the Act, and to pay such sum out of any moneys belonging to the city and applicable to municipal purposes generally. The money to

be repaid by the city to the county was not payable out of any particular fund. It was not payable out of a special rate to be levied for that purpose. It was payable by such a rate, or out of any moneys belonging to the city, and applicable to municipal purposes generally. This distinguishes the claim here from the claims that were made in some of the cases referred to. *Addison v. The Mayor, &c., of the Borough of Preston*, 12 C. B. 108 (the learned Judge says) is in favour of an action being maintainable."

The judgment then explains the meaning of the words "demand" and "recover," after which the judgment proceeds: "I think there is a right in the plaintiffs to recover the money in question, by action at law, from the defendants, if, after the amount is ascertained and determined in each year, the county does not immediately pay it."

There appears to me to be at least three differences between the case last referred to and the present case. In that case it seemed necessary that the yearly sums should have been annually ascertained, determined, and demanded by the county (the plaintiffs in the case.) In the present case I think no precedent act of this kind was necessary, as the by-law had fixed the rate to be levied. In that case the money was in effect payable out of any moneys belonging to the city and applicable to municipal purposes generally, whereas in this case the moneys were to be raised by special rate, and were not to be paid out of any fund but the one, not out of any other moneys that the defendants might have for general purposes; and that case was brought under an Act which empowered the plaintiffs there to "demand and recover" from the defendants. The statute relied on in the present case is quite different, providing (if my view of it is correct) that the defendants should continue to levy the special rate, and that their treasurer should pay over the amount as received to the treasurer of the plaintiffs, and I do not see that the decision in that case is an authority for the plaintiffs' contention here; the marked difference being that the moneys in the present case were to be raised by special rate and paid out

of the moneys so raised only. In that case the Court seems to have attached great importance to the fact that the moneys were not made payable out of any particular fund, but out of any moneys belonging to the city and applicable to municipal purposes generally.

In the case of *The Corporation of Frontenac v. The Corporation of Kingston*, 20 C. P. 49, which was not referred to on the argument of this case, it was not alleged that the plaintiff had ascertained and demanded the amount to be paid as required.

Mr. Justice Gwynne, who wrote a very elaborate judgment, and who seems to have been of the opinion that the plaintiffs could not recover at all, says at pp. 66 and 67 : "If, in the present case, the plaintiffs had in each year made a demand upon the defendants for their proportion, and the defendants had levied rates in each year to meet those demands, and had received the moneys arising from the rate, then the action of debt might perhaps be sustainable upon the authority of these latter cases" (referring to *Tileson v. The Town of Warwick Gaslight Co.*, 4 B. & C. 962, and *Carden v. The General Cemetery Co.*, 4 Bing. N. C. 258) "as for moneys received to the use of the plaintiffs. But that" (he says) "would be a totally different case from that which is disclosed on this record" (the record before him.) And the learned Judge says that the Acts of Parliament upon which the above two cases proceeded charged the claims sought to be recovered upon the first moneys which should be received by the respective corporations under their Acts, and the declaration averred the receipt by them of such moneys.

I do not profess to have referred here to every argument and every point raised by counsel at the trial, but after having perused the authorities referred to, which were not a few, and considered the case, which is to me one of a difficult character, the conclusion at which I have arrived is, that the plaintiffs are entitled to recover from the defendants as for money had and received to the use of the plaintiffs.

The by-law is, as I have already said, distinct and unmistakable as to the rate to be levied under it. The defendants, as is substantially admitted, acted under this by-law and levied, and collected, and received, and had the money. It was not money received for their own use or for any use, but for the purpose of forming a sinking fund for the payment of the principal money of the debentures when it should fall due. These debentures were the debentures of the plaintiffs. They are the party liable to pay the principal money. The amount of the special rate when received should, according to the statute, have been paid over to the treasurer of the plaintiffs, whose duty it was, under the provisions of sec. 386, to see that the money was properly applied.

I am of the opinion, as I have before indicated, that the defendants cannot shield themselves behind their officer and servant (their treasurer). I think that the money that was levied and collected by the defendants was, from time to time, received by them to the use of the plaintiffs, and I cannot perceive how they became discharged from this liability to the plaintiffs.

The Statute of Limitations has, however, been pleaded and relied upon by the defendants, and I think the plea properly applies to all sums levied and received by them more than six years before this action.

I think the plaintiffs are entitled to have an account taken of all sums of money levied and collected under the by-law, by the defendants, during the six years immediately before the commencement of this suit, and to an order for the payment of the amount found by the account.

As to the objection that the defendants cannot now levy and collect the money, I refer to the language of the judgment in *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 U. C. R. pp. 595-6, where it is said: "The defendants are by law liable to the demand now made. * * * Then why should not the plaintiffs obtain a judgment against them? The objection can only be because it may be said it may be of no use to

the plaintiffs ; they will not be able to enforce it; it would be illegal on the part of the defendants if they were to pay it. But the inability to make the judgment productive is no defence to the action, nor any reason why the judgment should not be obtained :" a statement for which the learned Judge cites many authorities.

I think the plaintiffs entitled to the account and the order mentioned above. In taking this account, I think that no interest should be allowed the plaintiffs, as I think the money payable otherwise than by virtue of a written instrument, and it is not shown that a demand of payment was made in writing, informing the defendants that interest would be claimed from the date of the demand : R. S. O. ch. 50, sec. 267, sub-sec. 2 : and I think the plaintiffs, by their negligence, I may say culpable negligence, have forfeited all right to costs.

The judgment will be as above, without costs ; and I think the plaintiffs should have no costs of the reference, which will be to the Master at Walkerton.

A. H. F. L.

[CHANCERY DIVISION.]

TRINITY COLLEGE V. HILL ET AL.

Mortgage—Opening foreclosure—New account—Interest on amount found due for principal interest and costs by original decree—Special order as to costs by Court of Appeal—Execution—Rule 351.

In a foreclosure suit a decree was made in November, 1877, and a final order of foreclosure obtained in June, 1878. In October, 1882, a petition was presented by the defendants to open the foreclosure, which was dismissed : 2 O. R. 348. The Court of Appeal reversed this decision, making an order to open the foreclosure on the usual terms of paying principal interest and costs, including the plaintiffs' costs of opposing the petition : 10 A. R. 99.

Held, affirming the decision of the Master in Ordinary, that the plaintiffs were entitled to interest on the whole amount of principal, interest, and costs as found by the decree of November, 1877.

Held, also, reversing the decision of the Master in Ordinary, that the plaintiffs were not entitled to interest on the taxed costs of opposing the petition to open the foreclosure, for these costs were not recoverable by force of the order made on the petition, which was reversed, but simply owing to the direction of the Court of Appeal.

Held, also, reversing the decision of the Master in Ordinary, that the plaintiffs were not entitled to the costs of writ of execution issued by them to recover their costs taxed under the order dismissing the petition, for the vacating of that order levelled the writ of execution, which was not part of the taxed costs of the petition but incurred subsequently.

THIS was an appeal from the report of the Master-in-Ordinary made upon a reference to take the account in a mortgage suit, where the foreclosure had been re-opened.

The report of the original application to open the foreclosure will be found in 2 O. R. 348, and the judgment of the Court of Appeal reversing the same, and referring it to the Master to take the account is reported in 10 A. R. 99.

The questions which arose before the Master in taking his account sufficiently appear from his judgment, which was as follows :

October 14th, 1884. MR. HODGINS, Q. C.—In this case the Court of Appeal, reversing the judgment of Boyd, C., 2 O. R. 348, has allowed the defendant to redeem the mortgaged premises “on payment into Court of principal money, interest, and costs, and subsequent interest and subsequent costs.” The question discussed before me was, whether this subsequent interest is to be computed on the

aggregate amount of principal, interest, and costs found due by the decree of the 14th November, 1877, or only on the principal sum secured by the mortgage.

The judgment of the Court of Appeal leaves this decree untouched, but re-opens the foreclosure, and gives the defendant further time to redeem on the terms above stated.

The cases show what is the rule where the amount is ascertained by the Master's report, and they appear to be consistent. In *Butler v. Duncomb*, 1 P. Wms. at p. 453, Lord Chancellor Parker stated that a mortgagee, "by getting reports of the money due, might make his interest principal, as it must be after the report confirmed." And in *Brown v. Barkham*, 1 P. Wms. 652, he said: "It is true, a Master's report, computing interest, makes that interest principal, and to carry interest; for a report is a judgment of the Court."

The observations of Lord Loughborough, in *Creuze v. Hunter*, 2 Ves. Jr. at p. 159, are to the same effect: "In the case of a mortgage the ground is plain. The estate belongs to the mortgagee: it is forfeited; the owner comes here to redeem; the Court orders payment on such a day, and that he shall redeem; he lets that time elapse; of course he must pay interest."

The House of Lords, in *Kelly v. Lord Bellew*, 4 Bro. P. C. 495, varied a decree of the Irish Court of Chancery, where there had been delay in carrying it out, by directing a computation of interest in a mortgage case on the whole sum found due by the Master's report, on which the decree had been made, instead of on the principal money secured by the mortgage. In a note to the case it is stated that "a stated account ought to carry interest, especially in cases of mortgages, and more strongly when settled by a Master of the Court pursuant to order."

In *Bruere v. Wharton*, 7 Sim. 483, the following note of the practice in Exchequer was cited to Sir L. Shadwell, V. C., who made an order in similar terms: "After the report of principal, interest, and costs on mortgage, and time enlarged, with order to compute subsequent interest, this subsequent interest shall be computed on the aggregate reported sum of principal, interest, and costs, and not on the principal only: and agreed the practice in Chancery to be the same."

The subsequent cases, up to the late case of *Elton v. Curteis*, 19 Ch. D. 49, show a slight variation in the practice under the rule, but not an alteration of the rule itself.

In *Whatton v. Cradock*, 1 Keen 267, Lord Langdale, M. R., after reviewing some of the cases, states the variation in the practice thus: "The time for paying what is found due on the mortgage is enlarged *upon payment* of the interest and costs found due; and the subsequent interest on the principal only, and subsequent costs are directed to be computed and taxed."

The same learned Judge is more explanatory in *Brewin v. Austin*, 2 Keen, at p. 212: "The practice formerly was not to order any immediate payment, but to order subsequent interest to be computed on the aggregate amount of principal, interest, and costs, already reported. For many years past, however, the practice has been to enlarge the time only on terms of first paying the interest and costs already reported; and these being paid, subsequent interest is to be computed on the principal only, that alone remaining unpaid. * * If, for any special reason, the Court should think fit to enlarge the time without ordering any immediate payment, I conceive it would now be proper to order the subsequent interest to be computed on the aggregate amount of principal, interest, and costs before computed."

In *Holford v. Yate*, 1 K. & J. 677, the minutes of the order, as settled in that case, shew the terms on which the foreclosure was opened, one of which was that the interest should be calculated on "the aggregate amount found due to the plaintiff."

Whitfield v. Roberts, 7 Jur. N. S. 1268, does not seem to be consistent with these decisions, although Sir J. Romilly, M. R., in giving judgment, admitted that "the usual condition was that the subsequent interest was to be computed upon the amount of the principal, interest, and costs found to be due."

In the late case of *Elton v. Curteis*, 19 Ch. D. 49—although a decision as to the computation of subsequent interest on successive redemptions in mortgage cases—the variation of the practice as to subsequent interest, where the time for redemption is extended, was referred to during the argument; and in giving judgment, Sir Edward Fry, J., quoted with approval the judgment of Lord Hardwicke, in *Bickham v. Cross*, 2 Ves. Sr. 471, that "where mortgagor came to redeem, and mortgagee to foreclose, and afterwards there is a report computing what is due for principal, interest, and costs, all that is considered as one accumulated, consolidated sum;" and that "the Court only

directs subsequent interest to be carried on, and leaves it to the Master, except as to mortgagees, in which the compound sum carries interest." And after referring to the distinction between the mode of computing interest in foreclosure actions and other actions, which he said appeared to have been recognized throughout the whole course of the Court, he arrives at the conclusion, that subsequent interest on successive redemptions in mortgage cases should be computed on the whole amount found due for principal, interest, and costs, and that such was "the well established and old practice of the Court."

These cases show that a Master's Report, when confirmed, becomes a judgment of the Court, and that subsequent interest is calculated on the aggregate amount of principal, interest, and costs therein found due.

But in this case the amount found due to the plaintiff for principal, interest, and costs was ascertained by a decree, which is unquestionably a judgment of the Court, and to which *a fortiori* the rule as to the computation of subsequent interest, applies. I must therefore follow the practice approved and settled by the cases referred to, and hold that the subsequent interest allowed by the Court of Appeal up to the enlarged time for redemption is to be computed on the aggregate amount of principal, interest, and costs found due to the plaintiffs by the decree of the 14th November, 1877, and not on the amount of the principal moneys secured by their mortgage.

As the Court of Appeal has allowed the plaintiffs their taxed costs of the hearing before the Chancellor, they are entitled to interest on these costs from the date of the certificate of taxation: *Schroeder v. Cleugh*, 46 L. J. Q. B. 365; and also to the costs of the *fitas* issued by them to enforce payment.

The Master accordingly, in his report dated October 21st, 1884, took an account of the subsequent interest due upon the principal money, interest, and costs found to be due the plaintiffs by the defendants in the decree of November 14th, 1877; he also reported as due to the plaintiffs for costs of foreclosure order, the sum of \$13.30, for costs of petition, the sum of \$58.68, for interest on said sum of \$58.68, the sum of \$2.69, and for costs of writ the sum of \$5.00, and taxed their subsequent costs at

\$10.50. He also reported as due to the purchaser Gratton, for costs of the petition \$143.77, for interest on the said sum from November 7th, 1882, the date of the certificate of taxation of the said costs, to the day named for redemption, the sum of \$17.05, for costs of writ and sheriff's fees \$5.75, and for subsequent costs including the costs incurred by him by reason of his purchase \$53.23, which sums he reported as payable to Gratton before the day named for redemption.

The defendant Hill appealed to the Judge in Chambers.

In his notice of appeal the grounds were set out as follows :

That the learned Master erred in the following particulars in fixing the amount to be paid by the defendants under the judgment of the Court of Appeal herein :

1. In directing that the subsequent interest to be paid by the defendants to the plaintiffs should be calculated on the sum of \$1428.26, being the amount found due to the plaintiffs by the Master-in-Ordinary for principal, interest, and costs, by his report dated the 20th day of May, 1873.

2. In directing the defendants to pay to the plaintiffs the sum of \$2.69, being interest on the costs of the petition herein, from the date of taxation thereof.

3. In directing that the defendants should pay to the plaintiffs the sum of \$5. being the costs of a *f. fa.* issued by the plaintiffs to recover the said costs of petition.

4. In directing that the defendants should pay to the purchaser, B. Gratton, the sum of \$17.05, being interest on the sum of \$143.70, the purchaser's costs of the petition herein.

5. And in directing that the defendants should pay to the said Gratton the sum of \$5.75, being the costs of a *f. fa.* and sheriff's fees issued to recover the amount of the said costs of the petition.

The appeal was heard on October 30th, 1884, before Boyd, C.

Bain, Q.C., for the appellant, cited *Fisher on Mortgages*, 4th ed., p. 896-8; *Elton v. Curteis*, 19 Ch. D. 49; *Whitfield v. Roberts*, 7 Jur. N. S. 1268; *Wilkinson v. Charlesworth*, 2 Beav. 470; *Whatton v. Cradock*, 1 Keen, 267.

VanKoughnet, Q. C., for Trinity College, cited *McMaster v. Hector*, 8 C. L. J. N. S. 284.

O'Brian, for Grattan, cited *Lippard v. Ricketts*, 41 L.J. N. S. Ch. 595; *Morgan* on Costs, 2nd ed., p. 233.

November 1st, 1884. BOYD, C.—The order made by me on the defendants' petition to open the foreclosure was vacated on appeal, and the costs payable thereunder to the plaintiff are not recoverable by force of that order, but simply owing to the direction given by the Court of Appeal, that the plaintiff's taxed costs of opposing that petition are to be paid by the defendants as a term of getting the indulgence craved by them. Had these costs been recoverable by that order, it would have been proper to compute interest upon them by virtue of Rule 351, and the form of execution, No. 176, which allows interest upon costs. But no right to interest upon the costs flows from the certificate of the Court of Appeal, which merely directs them to be paid as taxed so as to avoid a further taxation. The vacating of that order had the effect also of levelling the writ of execution, and no provision is found for the payment of the costs of that writ in the direction for payment of costs given by the Court of Appeal. The costs of the writ of execution were not part of the taxed costs of the petition, but were incurred subsequently to the taxation, and are therefore not covered by the certificate of the Court of Appeal.

Upon the other ground of appeal, relating to the manner of computing interest on the amount due to the plaintiffs, the Master has exhausted the case law, in his judgment, and has correctly laid down the rule of the Court, when an indulgence is granted to a mortgagor in extending the period of redemption.

So far as regards Grattan the purchaser, the terms of the certificate in appeal gave him his costs incurred in the action and in and about his purchase. He, like the plaintiffs, gets his costs, not under my order, which is set aside, but entirely by virtue of this direction. There is no basis therefore for allowing him any interest on these costs, and in that regard the Master erred. But Grattan

has the right to recover for his writ of execution, that is a part of the costs incurred by him in and about the purchase, and in the action.

The amount of interest allowed to the plaintiff, \$2.69, and \$5 for the execution should be deducted from the Master's total, and the amount of interest allowed Grattan, \$17, should also be deducted. With these exceptions the appeal is dismissed, with costs as to the plaintiffs, and without costs as to Grattan.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

MOLSONS BANK V. TURLEY.

*Principal and surety—Misrepresentation—Negligence—Alteration of liability
—Release of surety.*

The defendant, at the instance of F., the plaintiffs' manager, endorsed the note of C., to secure an advance to the latter on grain. It was represented to defendant by F. that the giving of his name was a mere formal matter: that only 75% of the value of the grain would be advanced: that warehouse receipts would be taken, and that he (F.) would from time to time see that the grain was in store, and would hold it in security for the money advanced, crediting the proceeds of any sales upon the note in question. The defendant was subsequently induced, by the representation of F., as the jury found, that it would not alter his position, to sign a guaranty under seal, which, though not intended, as F. stated, to vary the defendants' original liability, as a matter of fact did so, by permitting the plaintiffs to release or abandon their security upon the grain, upon the faith of which defendant became liable as endorser.

Held, that the guaranty was void as against the defendant; and that it was not necessary to prove that the bank manager knew, when he made it, that his representation was false; nor was it an answer that the defendant could have examined the deed for himself, as he was entitled to rely upon the representation of the bank's agent.

ACTION on a promissory note, dated December 9, 1882, made by Henry Coons, payable to the defendant, or order, on demand, at the plaintiffs' bank at Trenton, for \$10,000, and endorsed by the defendant; and on an instrument under seal, dated the 20th February, 1883, whereby the defendant, to the extent of \$10,000, and of any interest, costs, and expenses which might accrue or be incurred on or in relation to any sums up to that amount of those thereby guaranteed, guaranteed to the plaintiffs the due payment of all sums which were then or should at any time thereafter be owing to the plaintiffs from Henry Coons, whether the same should be owing for the amount of or upon any cheques, bills, or notes theretofore paid or discounted for the said Coons, or acquired by the plaintiffs from the said Coons, or any other person or persons, or owing in any other way or on any other account whatsoever; and thereby agreed with the plaintiffs that the plaintiffs might agree to any extension of time to, or

take any security from, or compound with, or release the said Coons, or any other person or persons liable on any guarantee or cheque, bill, or note, or otherwise, or surrender or release or abandon for or without value therefor, or omit to perfect or enforce any securities which, if any, the plaintiffs might then or thereafter hold or take, and should not thereby, or by any neglect as to any securities, be prejudiced in their claim thereunder, or incur any liability to the defendant, and that no payment, dividend or composition which should be received from the said Coons, or any other person or persons, should be taken in reduction of the liability of the defendant thereunder, but the same should be deemed payments in gross; and that the said instrument should be a continuing guarantee to the extent aforesaid, and should apply to and secure any ultimate balance that should remain owing to the plaintiffs, and should not be discontinued by the defendant's death, nor until written notice by the plaintiffs; and that if at any time any sum owing from Coons to the plaintiffs should not be paid when payable, the plaintiffs might, at their option, treat the whole amount owing from Coons as forthwith payable, and recover against the defendant the whole amount thereby guaranteed.

Defence :

Denial of plaintiffs' statement of claim : that the endorsement of the note and guarantee were obtained by fraud; and that a certain promissory note was made by Coons in order that he might procure advances from the plaintiffs for the purpose of buying grain, and that the endorsement thereof was procured from the defendant by the plaintiffs by their expressly agreeing with him that if he would endorse the said note as surety for Coons they would not advance to Coons more than seventy-five per cent. on the cost price of the grain, and that only on Coons's warehouse receipts after ascertaining that the grain was in store, and that the grain would be shipped in the plaintiffs' name during the grain season and sold, and the proceeds applied in discharge of said advances, and that the said endorsement would be col-

lateral to said warehouse receipts, and that the defendant would only incur liability if the grain fell below seventy-five per cent. of its cost during that grain season, and then only to the amount of the difference between the net proceeds of the grain and the seventy-five per cent. of its cost so advanced : that upon the said note falling due the plaintiffs represented to the defendant that a portion only of the said grain had been sold, and that the balance would be sold in a few days, and that sufficient would be realized to pay the said note, and thereby procured the said defendant to endorse the note sued on as a renewal of the said first mentioned note ; and that the plaintiffs, although they took warehouse receipts from Coons, did not ascertain that the grain covered by the warehouse receipts was in store, but neglected to do so, and after the grain covered by the said warehouse receipts was in store permitted the said Coons to dispose of the same to his use, whereby the defendant was discharged ; and that the said guarantee was given by the defendants under the same circumstances and upon the same terms and conditions as his endorsement of the said first mentioned note.

Issue.

The cause was tried at the last Fall Assizes at Belleville, by Galt, J., and a jury.

Coons was a grain buyer at Trenton, where he had an elevator, and the plaintiffs had a branch of their bank there managed by one Fraser. The defendant lived at Frankford, some seven or eight miles from Trenton, and was then a farmer, and in the fall of 1882 Coons was an applicant to the plaintiffs for a line of credit up to \$25,000 and was at the same time a debtor to the plaintiffs. Fraser was urging the plaintiffs to grant the application, and the plaintiffs were opposed to granting it, and on 24th October Fraser wrote to the plaintiffs that the defendant, the richest farmer within ten miles of Trenton, worth \$50,000 or \$60,000 at a low estimate, was willing to endorse Coons's paper with warehouse receipts to the extent of \$30,000 or \$40,000 for the then present season, if the plaintiffs were satisfied to

take his name, and that as an indication of the confidence which was reposed in Coons by the farmers in the neighbourhood, Mr. L. Abbott, another well-to-do farmer, had offered to become his security for \$12,000 or \$15,000.

The information of the willingness of the defendant and Abbott to so become sureties for Coons was derived from Coons alone.

On the 30th October the plaintiffs wrote to Fraser that pending the general manager's return to Montreal he might make advances to Coons to the extent of \$25,000, \$20,000 on the endorsement of the defendant and \$5,000 on that of J. Abbott, the whole to be further secured by warehouse receipts, and insurance as usual, margin 25 per cent., rate 8 per cent.

On the 8th of November, the defendant not having come in to endorse, as Coons informed Fraser he had promised, Fraser and Coons went out to see him. The defendant swore that he was reluctant to go security, and asked Fraser for explanations as to how the business was to be done: that Fraser told him the plaintiffs would advance 75 per cent. of the value of the grain: that they would take warehouse receipts: that he would see the grain was there: that he would hold the grain as security for the money advanced: that he considered defendant's name merely a nominal matter: that the plaintiffs insisted on having it and that was the only reason he asked him for it, as Coons outside the grain business was perfectly good himself: that he, defendant, then told Fraser he did not think he would do it, but that he would be in Trenton in a few days and let him know: that in three or four days he came to Trenton and went into the bank and saw Fraser: that Coons was not present: that Fraser said the plaintiffs would advance 75 per cent. of the value of the grain, and that they would take warehouse receipts on the grain: that he then asked Fraser how he would know the grain was there: that he said he would visit the warehouse every morning himself and see by personal inspection that the grain was there, and that he considered it merely

a formal matter getting his signature on the note: that it was just merely because the plaintiffs had ordered it so: that he considered the warehouse receipts sufficient security for all he advanced: that the grain would be shipped to the order of the bank, and the proceeds, when returns were made, would be credited on the note: that he told Fraser that he knew nothing about such things, and that if he told him that there was no risk to run in the matter he was perfectly satisfied to endorse the note for a short date: that Fraser said he would be very glad that he would do it until such time as Coons got other security, and on that he endorsed the note for ten days for \$10,000.

On cross-examination the defendant said that Fraser told him at the same time that a warehouse receipt was a first claim on the grain that was in the warehouse, and that he understood that Fraser would go to the warehouse before the warehouse receipt was accepted: that he did not ask him how he would satisfy himself: that he said from personal inspection: that he did not suppose he could weigh the grain by going into the warehouse: that he did not suppose he could tell exactly what there was there: that he gave him to understand that he would use his personal care and see that the amount of grain was there that was covered by the warehouse receipts.

The account given by Fraser of what took place at these interviews did not differ substantially from that deposed to by the defendant. He said that it was represented to the defendant and Abbott that they would not incur any risk, because the whole amount that would be advanced would be about 75 per cent. of the price: that he told the defendant that warehouse receipts would be taken with each draft: that the grain would be shipped to the plaintiffs' order: that he explained to him that the warehouse receipts would be a security upon the grain: that he would go and look at the elevator and see that things were all right there: that he honestly intended to see that the grain was there, and that he would visit the elevator

from time to time and see that there was what he considered sufficient to cover what there were receipts for.

The defendant further swore, and this was not contradicted, that in December sometime Fraser called him in and said the \$10,000 was long past due, and that the returns had not been all received, but the note was nearly paid up, and as a matter of business he thought he had better sign another note till the full returns came in. He said that some \$5,000 or \$6,000 had been paid on the note, and there was some grain frozen in that could not get to Oswego : that if this grain that was frozen in had got to Oswego the note would have been all cleared up : that he thereupon endorsed the demand note sued on, because Fraser asked him to, and said there was no use troubling him to sign a note every ten days, that it would have to be carried until the affair was closed ; that the grain might not all be disposed of in the ten days' time, and that as he was living away about eight miles it might not be convenient for him to come in, and it would be too much trouble to be getting a ten day note each time.

On the 24th of January, 1883, the plaintiffs wrote to Fraser, asking for advice whether the two guarantee forms filled out by the inspector, when he was lately at Trenton, had or had not been executed by Turley and Abbott ; and if not, why not ?

On the 25th of January Fraser wrote to the plaintiffs that Turley and Abbott, farmer like, demurred to signing the guarantee forms filled up and kept by the inspector when there, but gave their notes as surety for Coons's advances, with the understanding that they made good any deficiency which there might be at the close of the season.

On the 26th of January the plaintiffs wrote to Fraser : " Why did you not voluntarily advise us that Turley and Abbott refused to sign the guarantee, instead of waiting for us to put the question to you ? If we understand the matter aright they purpose by the notes to guarantee the bank against loss. Such being the case, what difference can it make to them how stringent the bond ? However,

if they will not sign it, it only remains for you to see that your dealings with Coons are strictly confined to such as the security covers. No overdraft must be permitted, nor any irregular advances made, such as would give the sureties colourable ground for disputing their liability."

On the 27th of January Fraser wrote to the plaintiffs: "It was only of late that I had an opportunity to speak to Coons's sureties with reference to signing the guarantee forms, and they considered that giving their notes, with the understanding that they were liable in event of loss, was quite sufficient without signing forms, the phraseology of which was a puzzle to them.

Not a bushel of the stock in store, nor for which bank holds warehouse receipts, will be shipped to other than bank order, and there is enough under my eye in elevator and storehouse here to pay all advances and leave a good margin."

Fraser admitted that, notwithstanding what was said in these letters, he had not up to this time seen the sureties Turley and Abbott on the subject of signing the guarantees, but had taken for granted what Coons told him, that they would not sign them.

The guarantee sued on was signed by the defendant on the 20th February, 1883. The defendant swore he had no recollection whatever of signing it; that he was on a spree at that time, and was not conscious of ever having signed it.

The subscribing witness said he remembered the transaction: that the defendant was in the manager's room, and he was called in to witness the signature: that the defendant had just finished signing it when he came in: that he had not completed his signature: that he did not read it to defendant, and that he did not remember whether defendant read it.

Fraser said he told the defendant that the head officer considered it necessary that such a bond should be signed: that he did not know that he made any strong objection to it: that he did not make any objection whatever

that he remembered of, and that he signed it in his presence.

On cross-examination he said that the defendant appeared to him to be quite sober: that he could not tell that he had been drinking: that he did not read it over to him: that his impression was that he did read it. Being asked:

"Q. Was this document intended to change in any way his liability on the note? he said: A. My notion is that it was part and parcel of that guarantee. Q. Of the original guarantee? A. Yes, I remember saying to him that it was for the carrying out of the same transaction, that the head office had considered it necessary that I should get the bond signed. Q. Acting for the bank you did not intend to get him to vary his original liability? A. I did not intend that he should be held responsible for more than \$10,000. Q. And upon the same terms as the original liability? A. I did not think anything about it in that regard, there was no intention of entrapping him at all. Q. Then you did not intend to bind him any farther than he had been bound by the original transaction whatever it was? A. I put the thing before him to be signed as the head office required. Q. Did you or did you not intend to vary the original bargain by that? A. No, I did not. Q. Did you tell him that, and did you tell him it was merely a form? A. I told him it was a form that the bank wished him to sign. Q. And did you or did you not tell him it was not to vary the original agreement? A. My impression is he was told it was just the same agreement. On re-examination. Q. Coming to this other document that is signed, what did you explain to him? Do you remember when you first saw Mr. Turley? A. It was the day he signed the bond. Q. Who brought him there, or how did he come there? A. He was in the bank at the time in front, doing some business with the teller, and when he was about to leave the bank I called him into my room and told him I had the bond. I explained to him that this was part and parcel of the first agreement, and that the head office was anxious to get him to sign it. He looked over the bond and asked me to change the amount. The teller had drawn it out for \$20,000, and he said it was too large, and the twenty was changed to a ten. There may have been some succeed-

ing conversation of no importance, but as far as I recollect that was in substance all that took place in connection with the bond."

By Fraser's evidence it appeared that in taking the warehouse receipts from Coons he took no means to ascertain whether the grain for which Coons was giving the receipts was really in the warehouse, but relied entirely on Coons's word for it: that he frequently visited the elevator in which the grain was said to be stored, and saw grain there, but took no means to ascertain the quantity, and relied solely on Coons's word for what quantity was there; except on one occasion in the summer of 1883, when he was going through the elevator with one Cronk, who attended to receiving the grain from the farmers for Coons, Cronk told him that in two bins which he saw had barley in them there were 6,000 or 7,000 bushels of barley: that he took no means to ascertain what the bins would hold: that he could not compute it himself: that the elevator belonged to Coons, and he took his word for it: that he allowed a shipment to be made by Coons of 14,500 bushels of barley to the order of the Merchants' Bank in the fall of 1882, and a shipment to be made by him of 8,000 bushels of rye for one Austin in August, 1883, and that he would not have allowed these shipments to have been made had he not felt satisfied that there was enough grain left to satisfy the warehouse receipts the plaintiff held: that no shipment could have taken place without his knowledge.

In the fall of 1883 all the grain was taken out of the elevator to close up Coons's transactions with the plaintiffs, and it was then found that instead of there being, as there should have been, 11,000 bushels of barley, there were only 1,127 bushels; instead of 8,000 bushels of rye there were only 1,809; and instead of 12,000 bushels of wheat there was none, leaving a shortage in all of 17,264 bushels.

The learned Judge left the following questions to the jury, which they answered as follow:

First. What was the representation made by Mr. Fraser when the first note was signed ? Was it part of the representation that the bank would advance only 75 per cent on the price paid for the grain ; that they would take warehouse receipts for the grain, and that the agent would satisfy himself that the grain really was in the warehouse ? A. Yes.

Second. At the time when the defendant signed the guarantee, did he do so on the representation of the plaintiffs' agent that it did not in any way alter his position ? A. Yes.

Third. Did the agent take steps to satisfy himself that the grain covered by the warehouse receipts was really in the warehouse, or did he negligently neglect to do so ? A. Found negligence on the part of the agent.

Upon these findings the learned Judge dismissed the plaintiffs' action, with costs, and directed the guarantee of the 20th February, 1883, to be cancelled and given up to the defendant.

November 20, 1884, *McCarthy, Q. C.*, obtained an order *nisi* to set aside the findings of the jury and the judgment, and to enter judgment for the plaintiffs for the amount claimed by them, with interest and costs, or for a new trial, on the following grounds : 1. That the plaintiffs were entitled to recover on the sealed guarantee sued on, and that there was no evidence to submit to the jury that the said guarantee had been obtained by fraud or misrepresentation. 2. That there was no evidence which could properly be submitted to the jury that the plaintiffs' manager had been guilty of any negligence in not seeing that there was the quantity of wheat in store which was warehoused to the bank by the defendant Coons. 3. That the finding of the jury that there was such negligence was contrary to law and evidence and the weight of evidence; and 4. That the judgment founded on the findings in favour of the defendant Turley was not warranted by the findings, and should have been entered for the plaintiffs.

On February 7, 1885, *McCarthy*, Q. C., *Hilton* with him, supported the order *nisi*. It is said the bank should have seen from time to time that there was grain in store to represent the warehouse receipts. This was done as far as it reasonably could be. The agent did inspect, but could not be expected to tell to a nicety that all that was brought was left there. He could not possibly do this unless he stayed on the premises and actually watched that none was taken away. Besides, the allegation that the agent was to satisfy himself that the grain was really in the warehouse, is not supported by the evidence. He never guaranteed that all the grain was there, merely that he would take all reasonable care it was not taken away. As to the second finding, that defendant was told the guarantee did not enhance his liability, there was no issue upon that, and it should not have been left to the jury. The defendant is liable as endorser. He sets up a separate contract, under which he says he ought not to pay; that is, that he endorsed on the faith of the agent seeing that the grain in store was there and was not removed, whereas at the most the undertaking was to take only reasonable care in the matter, and this the evidence shews he did. See *Molsons Bank v. Girdlestone*, 44 U. C. R. 54. The issue is on the defendant, and the evidence does not shew he was discharged.

Moss, Q. C., and *Clute*, contra. *Redgrave v. Hurd*, 20 Ch. D. 1, shews the difference between fraud avoiding a contract and fraud rendering a party liable for deceit. The defendant was told by the agent, when asked to sign the guarantee, that it did not vary his position towards the bank under his endorsement for Coons, and it does plainly do so. There was evidence of negligence on the agent's part in not seeing the grain was in store. He says he took the latter's word for it, which he had no right to do, as his undertaking with the defendant was to satisfy himself it was really there. The representations made by the agent to the defendant were those made when the latter was required to and did endorse

for Coons, for the guarantee was just to take the place of the endorsement. The agent allowed grain to be taken away on different occasions by others, which he should not have done, and which he said he would not have done had he not thought there was enough left. There was no loss by shortage.

McCarthy, Q. C., in reply. The grain taken was by the Merchants Bank, to whom it belonged, and it was taken away before the agreement in this case was made; and so as to grain taken by Ross. In June, 1883, there were 11,000 bushels in store after two shipments had been made. The deficiency occurred after this, if the agent's evidence is correct.

March 7, 1885. **ARMOUR, J.**—No objection was taken by counsel at the trial to the questions submitted to the jury, nor that other questions than those submitted should have been submitted. It must therefore now be taken that the findings upon these questions disposed of all the matters in controversy at the trial.

The finding of the jury as to the first question submitted to them was amply sustained by the evidence. The account given by the plaintiffs' manager of what took place during the negotiations for obtaining the security of the defendant's endorsement did not differ substantially from that given by the defendant, and would, in my opinion, have warranted a finding that by the representation made the manager undertook a greater responsibility in respect of the grain than merely that he would satisfy himself that the grain really was in the warehouse.

The evidence of the plaintiffs' manager of what took place when the guaranty was signed, coupled with the terms of the guaranty itself, imposing a new liability upon the defendant, altering the conditions of his existing liability, and permitting the plaintiffs to release or abandon their security upon the grain, which was the basis of his becoming liable as endorser, and upon the faith of which he became liable as such, justified the jury in coming to the conclusion that

the defendant signed the guaranty on the representation of the plaintiffs' agent that it did not in any way alter his position.

The legal question upon this finding, however, is, was this representation, if untrue, sufficient in law to entitle the defendant to avoid the security?

In *Lewis v. Jones*, 4 B. & C. 506, the action was by the indorsee against the indorser, G. R. Jones, of a note made by W. W. Jones. At a meeting of the creditors of W. W. Jones the plaintiff signed the following paper: "We, the undersigned creditors of W. W. Jones, agree to accept of five shillings in the pound in full of our original demands against him, on having a joint note from him and his father William Jones, payable in twelve months from the date hereof." The father and W. W. Jones gave their joint note to the plaintiff in pursuance of the agreement. One Morgan, as agent of W. W. Jones, at the meeting stated that the defendant, notwithstanding that the plaintiff signed the agreement, would continue liable for the residue of the debt secured by the note. The learned Judge told the jury to find for the plaintiff if they thought that he was induced by any false representation to sign the agreement. The jury found for the plaintiff. In granting a new trial Sir John Bayley said: "The only question, therefore, is whether the plaintiff was induced by any fraudulent representation to sign the agreement. It was represented by the agent of the insolvent, at a meeting convened for the purpose of executing the agreement of composition, that the surety would continue liable, notwithstanding the agreement of the creditor to accept in full five shillings in the pound, to be secured by the father. That, however, was a misrepresentation merely of the legal effect of the agreement. Now every man is supposed to know the legal effect of an instrument which he signs, and therefore this must be taken to be a representation as to a fact within the knowledge of the creditor, and such misrepresentation will not have the effect of avoiding this instrument, because it was not calculated to mislead the creditor."

It will be observed that in this case the plaintiff knew the contents of the instrument which he signed, and the representation was not made by the agent of the defendant but of the maker, and was one "not calculated to mislead the creditor."

In *Edwards v. Brown*, 1 C. & J. 307, the same learned Judge, Sir John Bayley, in delivering the judgment of the Court, said: "I agree that whatever shews that the bond never was the deed of the defendant may be given in evidence on *non est factum*. But if the party actually executes it * * and was not deceived as to the actual contents of the bond, though he might be misled as to the legal effect, and though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became by the execution the deed of the defendant, and he is not at liberty upon the plea of *non est factum* to say it was not."

In *Foster v. McKinnon*, L. R. 4 C. P. 704, the defendant was induced to endorse a bill of exchange by the fraudulent representation of the acceptor that he was signing a guaranty. The jury were directed, and it was held to be a proper direction, that if the defendant's signature to the document was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing it was a bill and under the belief that it was a guaranty, and if he was not guilty of any negligence in so signing the paper, he was entitled to a verdict.

Byles, J., at p. 711, in delivering the judgment of the Court, said: "The case presented by the defendant is, that he never made the contract declared on: that he never saw the face of the bill: that the purport of the contract was fraudulently misdescribed to him: that when he signed one thing he was told and believed that he was signing another and an entirely different thing, and that his mind never went with his act. * * But the position, that if a grantor or covenantor be deceived or misled as to the actual contents of the deed the deed does not bind him, is supported by many authorities. * * The

defendant never intended to sign that contract or any such contract. * * He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument."

In *Hirschfield v. London, Brighton and South Coast R. W. Co.*, L. R. 2 Q. B. D. 1, the cases above quoted were referred to and commented on, and Mellor, J. said : "I think that there is nothing in law, and certainly nothing in equity, which says that a man who has been induced to execute a deed in consequence of a misrepresentation as to its effect, has no defence ;" and Lush, J., said : "I do not think that we need determine the question which has mainly been argued, whether a fraudulent representation as to the effect of a deed can be relied upon as a defence to an action upon the deed ; but I should not have the least hesitation in holding that it does constitute a defence, and I think that we have been referred to no authority which should induce us to decide otherwise."

I think that upon these authorities a party is entitled to avoid a deed which he has been induced to sign upon a misrepresentation by the party claiming the benefit of it or by his agent, either as to the actual contents of the deed, or as to its legal effect.

I am also of opinion that it is not necessary in such a case to prove that the party who made the representation knew at the time he made it that it was false, nor is it any answer that the party to whom it was made could have examined the deed and discovered its actual contents and its legal effect, and was guilty of negligence in not doing so, for he was entitled to rely upon the representation.

In my judgment therefore upon the finding of the jury the guaranty must be held to be void.

I refer to *Flight v. Booth*, 1 Bing. N. C. 370; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64; *Redgrave v. Hurd*, L. R. 20 Chy. D. 1; *Dominion Bank v. Blair*, 30 C. P. 591; *Midland Great Western R. W. Co. v. Johnson*, 6 H. L. Cas. 810; *Stone v. Godfrey*, 5 DeG. M. & G. 76; *Re Saxon Life Assurance Co.*, 2 J. & H. 408; *Rash-*

dall v. Ford, L. R. 2 Eq. 750; *Beattie v. Lord Ebury*, L. R. 7 Chy. 777; *S. C.*, L. R. 7 H. L. 102; *Cooper v. Phibbs*, L. R. 2 H. L. 170; *Earl of Beauchamp v. Winn*, L. 6 H. L. 234.

Then, as to the finding of the jury on the last question put to them by the learned Judge, I think the jury were well warranted in finding as they did that the plaintiffs' agent was guilty of negligence in not taking steps to satisfy himself that the grain covered by the warehouse receipts was really in the warehouse.

A careful perusal of the evidence has satisfied me that the shortage arose from Coons's giving warehouse receipts for grain which he had never received.

The plaintiffs' agent was quite content to take Coons's word that he had received the grain for which he gave the warehouse receipts, and did not take any precaution whatever to ascertain whether, when he took the warehouse receipts from Coons, the grain for which he took them had been received by Coons, or was in the warehouse as represented by Coons.

These transactions were going on for as much as a year, and during the whole of that time, although the warehouse was close by, and although the plaintiffs' agent frequently visited it, with the exception of his once in the summer of 1883 asking Cronk, the man in charge of the warehouse for Coons, what amount of grain was in two bins in the warehouse, he never took any means whatever to ascertain what quantity of grain was in the warehouse, but relied entirely on what Coons told him.

Under these circumstances I think the plaintiffs' agent was just as negligent as he could be, and that it is due to the kindly forbearance of Coons that the shortage was so little.

The order *nisi* must be discharged, with costs.

See *Molsons Bank v. Girdlestone*, 44 U. C. R. 54.

WILSON, C. J., and O'CONNOR, J., concurred.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

TAYLOR V. McCULLOUGH.

Assault and battery—Criminal prosecution—Staying proceedings—Pleading.

To an action for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate, charging defendant with feloniously, &c., wounding the plaintiff, with intent to do him grievous bodily harm, thereby charging the defendant with felony: that defendant was brought before the magistrate, and committed for trial, which had not yet taken place: that the subject of both the civil and criminal prosecution was the same, and that plaintiff's civil right of action was suspended until the criminal charge was disposed of: *Held*, on demurrer, plea good; and an order was accordingly made staying the civil action in the meantime.

THIS was a demurrer to defendant's plea.

The action was for damages occasioned to plaintiff by defendant assaulting and beating him, fracturing his skull and disfiguring his forehead permanently, and otherwise injuring him.

Besides denying the alleged cause of action, the defendant pleaded *son assault demesne*; and that prior to the commencement of this action the plaintiff caused an information and complaint to be laid before a justice of the peace, alleging that the defendant did * * feloniously, unlawfully, and maliciously wound * * the plaintiff with intent thereby to do * * the plaintiff some grievous bodily harm * * thereby charging the defendant with having committed a felony. The plea further alleged that a summons was issued, the defendant brought before a justice of the peace, remanded, and on evidence taken committed for trial at the next Court of competent jurisdiction, and that the trial had not taken place. And the defendant said that the said assault and trespass complained of in the statement of claim were the same assault and trespass complained of in the said information, and for which he, the said defendant, was committed to stand his trial: that the plaintiff's right to commence and prosecute this action was suspended

until the criminal charge on which he was committed for trial was tried, and that the plaintiff by commencing and prosecuting this action was abusing the process of the Court.

To this the plaintiff demurred.

Aylesworth, for the demurrer, cited *Walsh v. Nattrass*, 19 C. P. 453; *Brown v. Dalby*, 7 U. C. R. 160; *Williams v. Robinson*, 20 C. P. 255; *Wellock v. Constantine*, 2 H. & C. 146; *Lutterell v. Reynell*, 1 Mod. 283; *Stephen on Pleading*, p. 43; *Wells v. Abrahams*, L. R. 7 Q. B. 554; *Hayle v. Hayle*, 3 O. S. 296; *Stone v. Marsh*, 6 B. & C. 564; *Ex parte Ball, Re Shepherd*, 10 Chy. D. 667; *Midlund Ins. Co. v. Smith*, 6 Q. B. D. 561; *Roope v. D'Avigdor*, 10 Q. B. D. 412.

Osler, Q. C., contra, cited *White v. Spettigue*, 13 M. & W. 602; *Crosby v. Leng*, 12 East 409; *Kneeshaw v. Collier*, 30 C. P. 265; *Harris*, Crim. Law, p. 3; R. S. O. ch. 128, sec. 2.

March 9, 1885. ROSE, J.—By his demurrer the plaintiff admits that the action is brought for the same cause as is the foundation of the charge of felony, and that he (plaintiff) caused the information and complaint to be laid, "thereby charging the defendant herein with having committed a felony."

This admission seems to me to dispose of two points taken by Mr. Aylesworth; namely (1), that the facts set out in the statement of claim at most proved a misdemeanor under section 19 of ch. 20, 32-3 Vic., D., and not a felony under section 17 of the same statute; and (2), that the statement of defence did not allege that the information was laid by the plaintiff. I cannot see that he is in any different position if he causes an information to be laid to what he would be if he laid it himself.

In the old form of pleading, in a count for a malicious prosecution on a charge of felony, the allegation is given in the alternative, namely, that the defendant falsely, &c.,

appeared and charged, &c. [or caused and procured one G. H. to appear and charge, &c.]: see *Dubois v. Keats*, 11 A. & E. 329, and the forms of pleading in *Bullen & Leake*, 2nd ed., p. 307.

By this pleading the defendant does not admit that he is a felon ; he merely puts upon the record that the plaintiff caused to be instituted criminal proceedings for felony, which are now pending, and subsequently brought this action for damages for the same offence.

It seems to be admitted that, to use the words of Lord Ellenborough, C. J., in *Crosby v. Leng*, 12 East 413, "the policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence." See also the language of Cockburn, C. J., in *Wells v. Abrahams*, L. R. 7 Q. B. p. 557, to which he adds, " But although that is the rule it becomes a different question when we have to consider how it is to be enforced."

That was an action of trover and trespass for a brooch ; pleas, not guilty, and not possessed ; verdict for plaintiff. The defendant contended that the learned Judge at the trial should have nonsuited, on the ground that the facts *shewn in evidence* amounted to a felony. There was no pending prosecution. It was held, per Cockburn, C. J., that the Judge at the trial had no power to nonsuit ; that sitting as a commissioner (this was in 1872, before the Judicature Act) he was bound to try the issues : that possibly he might have refused to enter upon the trial, leaving the Court thereafter to have dealt with the case, but that once the case was brought before him he could only try the issues raised upon the record, and therefore could not have left to the jury the question as to the intent with which the brooch was taken.

The defendant's counsel was asked during argument whether he would at the trial have assented to the proposition that the facts proved amounted to a felony, and he answered that he would not.

The learned Chief Justice says: "Having obtained a rule founded upon the hypothesis that the facts proved at the trial amounted to a felony, he yet persists in denying that his client has committed a felony; so that he seeks to have the benefit of something, the existence of which he denies. When the case has thus been explained, it is manifest the defendant has no *locus standi* to make this application. He can only apply to us upon the ground that he has committed a felony; but at the same time he denies that he is a criminal. Can it be said that my learned Brother at the trial did anything beyond that which he was called upon to do, namely, try the issues brought before him?"

This decides nothing more than what our own Courts decided in *Williams v. Robinson*, 20 C. P. 255. There the present Chief Justice of Ontario said that if the Judge at the trial believes that a rape has been committed it is his duty to stop the case, and not leave it to the jury with a direction to find for the defendant if they think it was a rape. He adds: "The case should not go to them, and the defendant is not entitled to a verdict on any such ground."

Gwynne, J., said: "The Judge should stop the civil action, *as not yet ripe for trial* until the question of the felony should be tried and determined."

Although, since the Judicature Act, the Judge at the trial has very much greater power than before, his added powers do not, so far as I can see, render the above decision in any way inapplicable; that is, he cannot now, more than then, on such a state of facts, submit the question of felony to the jury; he can only stop the case as not yet ripe for trial.

But it is argued the defendant cannot be allowed to set up his own criminality as a defence. This would appear reasonably clear from the authorities, and if to this action the defendant had pleaded, not a pending prosecution, on a charge of felony, at the instance of the plaintiff, but that the assault had been committed under such circumstances

as amounted to felony, and hence the action was not maintainable, such a plea probably could not be allowed; but here what he alleges, and what the plaintiff admits, is not that the defendant has been guilty of felony, but that prior to this action the plaintiff set on foot a prosecution for felony.

If the plaintiff had set out such a state of facts in his claim as evidenced a felony, and the defendant had demurred to the statement of claim, and thereby admitted the felony, the same objection would arise. The case of *Roope v. D'Avigdor*, L. R. 10 Q. B. D. 412, would be an authority to shew that, in the words of the head-note, "a statement of claim is not demurrable on the ground that it shews the cause of action to be a felony for which the felon has not been prosecuted."

In that case Cave, J., expressed the opinion that if there were any mode of staying such an action, it must be by some application made summarily to the Court, and not by demurrer.

In *Wells v. Abrahams*, Cockburn, C. J., said: "But it may very well be that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of this Court might be invoked to stay the proceedings, which would involve an undue use, probably an abuse of the process of this Court, in which case the Court is always willing to interfere to prevent such abuse."

Blackburn, J., at p. 562, said: "I do not see how a plaintiff can be prevented from trying his action unless the Court acting under its summary jurisdiction interferes." Again, on p. 563, commenting on the case of *Wellock v. Constantine*, 2 H. & C. 646, where the Court did not set aside a nonsuit, assigning no reasons, he says: "I think that the Court ought to have held that the nonsuit was wrong, but that if they set it aside it might have been on the terms that the proceedings should be stayed until the criminal charge had been tried."

Lush, J., said that "by what means the duty to prosecute is to be enforced we are nowhere informed."

He was of the opinion that a Judge at *Nisi Prius* had no power to refuse to try the cause, or, after a part of the evidence had been given, to stay proceedings against the parties.

Both Lush and Quain, JJ., seemed to think if the declaration disclosed the felony, it might be the subject of a demurrer or motion in arrest of judgment.

The language of Lush, J., is: "If the declaration discloses that which would be the subject of a demurrer, or a motion in arrest of judgment, I cannot see that the Judge dealing with the cause at *nisi prius* has any power to interfere in order to enforce that supposed defect."

Cave, J., in *Roope v. D'Avidgor*, said that this language did not express an opinion that such a defence should be raised by demurrer.

On this record it seems to me the plaintiff cannot urge that the facts to be brought out in the evidence will not shew a felony. The defendant may so urge at the trial on the indictment, if found.

The plaintiff is, therefore, in my opinion, in no better position than if he had spread the facts upon the record, or had shewn them at the trial. It would, I think, be the duty of the Judge at the trial, if the facts appeared on the record, to postpone the trial until after the termination of the prosecution. It might be that the defendant would have no costs, or only such costs as if he had moved in Chambers to stay proceedings immediately upon the statement of claim being served.

If the facts appear in the evidence at the trial, then I think the Judge should stop the case and postpone the trial. I am inclined to think pleading the facts as here not to be a convenient practice. The facts cannot of course be pleaded in bar; they are at most a ground for suspension of the action. If the plaintiff had traversed the statement of defence, instead of demurring, the case would necessarily have gone on to trial to be there stopped.

If the facts set out in the plea had been put in the form of an affidavit the defendant might have moved in Chambers to stay proceedings.

It is true that by placing them on the record he has notified the plaintiff of his intended defence, and given him the opportunity of agreeing to not further prosecute his civil action until after the termination of the criminal prosecution ; or, if he did not so elect, the defendant would have some ground to urge at the trial that the plaintiff should pay all fruitless costs occasioned by his proceeding in face of the notification given by the statement of defence. So pleading gives the plaintiff the option of traversing the statement that the cause of action is for damages arising from a felony. It seems to me, however, that all this could arise on a motion to stay proceedings made after statement of claim delivered ; and if on such motion the plaintiff denied that he was proceeding upon the same state of facts the defendant would know how to shape his defence.

Since the Judicature Act I do not think the Judge at the trial would feel embarrassed by want of jurisdiction or power to make all necessary orders.

I have not overlooked the case of *Ex parte Ball, In re Shepherd*, L. R. 10 Ch. D. p. 667. The doubts expressed by Bramwell, L. J., as to every mode of procedure theretofore suggested have not afforded me much assistance in arriving at a conclusion. I think, however, the case of *Wells v. Abrahams* affords solid ground upon which to proceed.

It seems to me the proper order to make is to overrule the demurrer, and now to make an order staying proceedings in this action until after the criminal prosecution has been terminated.

The plaintiff fails, but, as the point is a new one, the costs will be costs in the cause to the defendant, not, however, in any event of the cause.

Judgment for defendant on demurrer.

[CHANCERY DIVISION.]

McCarthy v. Cooper et al.

Contract—Deed ineffectual as conveyance, effectual as contract—Statute of Frauds—Principal and agent.

W. signed and sealed a deed of conveyance of certain land to C., who supposed him to be the owner of the land, as he professed himself to be, whereas he was really only acting as agent for M., the owner. M. now brought this action against C. for specific performance of, as he alleged, a contract on C.'s part to purchase the land. There was no note or memorandum of the alleged contract, other than the said deed, which was signed and sealed by C., and was in the ordinary short form, and acknowledged the receipt and payment of the purchase money, though the evidence shewed that only 10 per cent. of it had been actually paid. It did not appear that the deed had ever been delivered.

Held, that the deed, though incomplete as a conveyance, was evidence of a contract of sale, sufficient to satisfy the Statute of Frauds.

Held, also, that though W. professed at the time of the contract to be the owner of the land, yet, as in reality he was acting as agent for M., M. could avail himself of the contract, and was entitled to judgment.

THIS was an action brought by Peter McCarthy against William J. Cooper and John D. Oliver, for specific performance of an alleged agreement, or in lieu thereof for \$4,000 damages against the defendant Cooper; and as against the defendant Oliver for \$500, less his commission in respect to the alleged sale.

The facts are fully stated in the judgment and footnotes thereto.

The action was tried at the sittings of this Division, at Toronto, on June 29th, 1883, before Ferguson, J.

G. T. Blackstock, for the plaintiff. The receipt, the conditions of sale, the deed, and the telegrams, shew a complete, contract. The deed of itself is equivalent to an agreement. I refer to *Flint v. Woodin*, 9 Ha. 618; *Fellowes v. Lord Gwydyr*, 1 Sim. 63; *Parton v. Crofts*, 16 C. B. N. S. 11.

H. Murray, for the defendant Oliver. Oliver has a lien on the money in his hands: *Story on Bailments*, 9th ed., sec. 329; *Bateman on Auctions*, 1st Am., 6th Eng. ed., p. 228; *Story on Agency*, 9th ed., sec. 352.

D. Black, for the defendant Cooper. As to receipts, receipts are given in a form to suit the party giving them. The defendant Cooper only used the receipt here for a particular purpose. See *Fry* on Spec. Perf., 2nd ed., pp. 230, 231, secs. 501, 502. As to the deed, that is not *in fieri*: it is a completed transaction if anything, and is not the basis for specific performance: *Ib.* 106, 107; *Higgins v. Senior*, 8 M. & W. 844. Moreover, the contract, if there was one, was made out of the jurisdiction. The defendant Cooper could not sue the plaintiff, because both he and the property are out of the jurisdiction, and the contract was made out of the jurisdiction. Hence there is want of mutuality, which is fatal: *Fry* on Spec. Perf., 2nd ed., pp. 201, 202. Wood again should be a party, or full justice cannot be done. I refer also to *Fry* on Spec. Perf., 2nd ed., p. 201, sec. 441.

Blackstock, in reply. The deed having been signed by both parties, shews that there was *consensus* in regard to the subject matter, and the *consensus* for which the plaintiff contends here, and it is, therefore, a note or memorandum in writing within the statute. I refer to *Fry* on Spec. Perf., 2nd ed. p. 232, sec. 504; *Nelthorpe v. Holgate*, 1 Coll. 203.

June 24th, 1884. FERGUSON, J.—The action is brought for specific performance of an alleged contract between the plaintiff and the defendant Cooper, for the purchase and sale of a block of land in the Province of Manitoba, said to be known as block number seventeen, in the north-east quarter of section number fifteen, in township number ten, range nineteen, West Brandon, containing forty lots, bounded on the north by VanHorn avenue, on the south by Park avenue, on the east by eighteenth street, and on the west by nineteenth street; the plaintiff alleging that, on or about the month of March, 1882, he entered into an agreement with the defendant Cooper to sell and convey these lands to him, and that Cooper on his part agreed to purchase the same for the sum of \$5,000, and subsequently

paid to the defendant Oliver, who was the plaintiff's agent to receive the same, the sum of \$500, being the amount of the cash deposit of ten per centum of the purchase money. He alleges that the defendant Cooper has since persistently refused to carry out and complete the contract, and that he has himself been always ready and willing to perform and carry out the same on his part. The plaintiff also says that the defendant Oliver refuses to pay him the said sum of \$500, less a commission of five per centum on the same, which he admits that Oliver is entitled to retain thereout. The plaintiff claims an order for specific performance against the defendant Cooper, or, in lieu thereof, \$4,000 damages; and against the defendant Oliver a judgment for the \$500, less the commission aforesaid.

The defendant Cooper in his statement of defence denies the making of the alleged agreement, but says that he entered into negotiations with one D'Arcy Wood, for the purchase of the lands, and that Wood represented to him and he believed that Wood was the owner of the lands: that he is advised and believes that the negotiations with Wood did not amount to a contract in writing within the meaning of the Statute of Frauds which would be binding upon the defendant Cooper, and he claims the benefit of the statute as against the plaintiff; but he says that he was at the time anxious to complete the purchase from Wood and get possession of the land: that Wood executed a conveyance purporting to convey the lands to him, and left the same with the defendant Oliver to be delivered to him (Cooper) upon completion of the purchase, but that owing to the fact that Wood was not able to shew a good title, the purchase "fell through," and the deed was never delivered. He also says that the lands were desirable to him only for the purpose of selling them again at an advanced price, and the contract in question was made with reference to this fact, which the plaintiff well knew, but owing to the delay caused by the plaintiff and Wood in making a title to the land, he (Cooper) lost the opportunity of selling the lands at a profit, and that owing to

this delay he notified Wood long before this suit was commenced that he would withdraw from the contract. He says that the \$500 mentioned by the plaintiff in his statement of claim was deposited by him with his co-defendant Oliver upon condition that it should, if the purchase "fell through," be returned to him (Cooper), and he claims an order for re-payment of this sum against the plaintiff and the defendant Oliver.

The defendant Oliver, in his statement of defence, says that he acted as agent for the plaintiff in the matter of the sale of the lands; that as such agent he effected a sale the land to the defendant Cooper for \$5,000, and received from him the \$500 deposit: that the plaintiff agreed to allow him a commission of five per cent. on the \$5,000, amounting to the sum of \$250: that he paid \$1 for telegrams, leaving a balance of \$249, which sum he has always been and still is ready and willing to pay over to the person entitled to it; but that long before the suit he was forbidden by the defendant Cooper to pay it to the plaintiff, and was also forbidden by the plaintiff to return it to the defendant Cooper: that he makes no claim to the \$249, and will pay it pursuant to any order that may be made in this action, and claims his costs. Issue is joined by the plaintiff.

The plaintiff and Wood were both resident in Manitoba. The defendants both resided in Toronto. The defendant Oliver is, as I understand, an auctioneer, and accustomed to making sales of land. He was at the time of the transactions a member of the well-known firm F. W. Coate & Co.

At the trial the plaintiff relied upon documents, no less than seven in number, to make out the note or memorandum required by the statute.

The first (earliest in date) of these is a telegram addressed to Wood at Winnipeg, and signed by F. W. Coate & Co. It bears date the 4th of March, 1882, and is in these words :

"Four (4) thousand dollars payable here, fourteen days from acceptance offer, on delivery deeds; block seventeen. Answer."

The next in order of time is a telegram addressed to Wood, and is signed by F. W. Coate & Co., and is in these words :

" Five thousand, best offer for seventeen."

And bears date the 7th of March, 1882.

The next is a telegram of the 8th of March, 1882, from Winnipeg, addressed to F. W. Coate & Co., and signed by Wood. This is in these words :

" Accept offer. Will be down."

The next is a receipt, which is as follows:

" Received from W. J. Cooper, Esq., the sum of six (his cheque) hundred dollars, being ten per cent of purchase money on purchase of Block 17, North-east quarter section 15, Township 10, Range 19, West Brandon, Manitoba, containing 40 lots, the said lots having been purchased on the following terms, viz: One-half cash, balance in five months, on mortgage at 7 per cent, as per our telegram to the vendor.

" Toronto, 9th of March, 1882.

" For the vendor,

" Witness,

" F. W. COATE & CO."

" W. JAMES COOPER."

To this document is attached an affidavit made by the defendant Cooper, for the purpose of registration; and as appears by a certificate of a deputy-registrar, and as was admitted at the trial, it was registered on April 1st, 1882.

There is then a paper, for the most part printed, but with some written parts, called conditions of sale. This bears date March 10th, 1882. It is signed by the defendant Oliver, as auctioneer. And lastly, the alleged conveyance from Wood to the defendant Cooper, bearing date March 14th, 1882, which appears little, if any, different from the ordinary conveyances here which are drawn according to the short statutory form. This bears the signatures and seals of Wood and the defendant Cooper (a).

(a) This conveyance was as follows :

This Indenture, made (in duplicate) the 14th day of March, 1882, in pursuance of the Act respecting short forms of indentures, between Charles D'Arcy Wood, of the City of Winnipeg, Real Estate Agent, of

There was no marginal receipt for the purchase money.

It appears that in addition to the telegrams referred to above sent to Wood there was one offering \$6,000, for Oliver in his evidence says that when the telegram from Wood of the 8th of March came he supposed it was an answer to the \$6,000 offer: that when Cooper came in the next morning he said that it must be an answer to the \$5,000 offer, and they concluded to wait for Wood's arrival, and when Wood came he said it was an answer to the \$5,000 offer. On these documents the plaintiff relies to make out the contract or the necessary note or memorandum. There was some subsequent correspondence, but the plaintiff's counsel candidly stated and admitted that this does not contain what is necessary to make out a contract.

The defendant Oliver was called by the plaintiff as a witness, and he said the property was placed in his hands (generally) for sale; a few days before the sale he went to the defendant Cooper, and he says he made a sale to him, (that is, what he calls a sale.) He says

the first part, and William James Cooper, of the City of Toronto, Real Estate Broker, of the second part.

Witnesseth, that in consideration of \$5,000, of lawful money of Canada, now paid by the said party of the second part to the said party of the first part (the receipt whereof is hereby by him acknowledged), he the said party of the first part doth grant unto the said party of the second part, his heirs and assigns, for ever, all and singular that certain parcel or tract of land and premises, situate, lying and being [the lands in question]. To have and to hold unto the said party of the second part, his heirs and assigns to and for his heirs and their sole and only use for ever, *subject nevertheless*, to reservations, limitations, provisions, and conditions expressed in the original grant thereof from the Crown.” [Then followed covenants for good right to convey, quiet possession, further assurance, and against incumbrances.] “ And the said party of the first part releases to the said party of the second part all his claims upon the said lands.

In witness whereof the said parties hereto have hereunto set their hands and seals.

Signed, sealed, } (Signed) CHARLES D'ARCY WOOD. (Seal).
and delivered in } (Signed) W. JAMES COOPER. (Seal).
presence of:

(Signed) T. D. DELAMERE.

41--VOL. VIII Q.R.

he sold the land at private sale. He says that the defendant Cooper never authorized him to sign any papers for him, and that up to the time Wood arrived he understood that he (Wood) was the owner. The defendant Cooper in his evidence says, that on the 4th of March he told Oliver that he would give him \$4,000 for the property, asking him to telegraph his principal, and that he asked Oliver who his principal was, and that he said Wood was his principal. He says that the first time he saw Wood was the day the deed was signed: that later in the day Wood was in his (Cooper's) office and that Wood told him that he (Wood) was the owner of the property. He says he asked Wood about the title, and Wood told him that there was an agreement for sale from the Pacific Railway Company to one Corbin, and a deed from Corbin to him, and that he had directed this to be sent for registration, saying, he generally recorded his deed where he made sales. Cooper says that he then told Wood that he was in a hurry and wanted the matter pushed through as speedily as possible. He says that at that time property was "booming" at Brandon: the railway was being built westward and it was apprehended that the excitement would diminish there, and that as the Railway was being built westward demand for land at Brandon was diminishing. He says he did not authorize Oliver to sign any paper for him, and that Oliver did not act as his agent at all in the matter, and that he never authorized Oliver to act for him. He says that his reason for signing the receipt of the 9th of March, as a witness, and procuring it to be registered, was that he had paid the \$500, and he had heard that Wood was not good and he feared that he would sell to another and that he (Cooper) would get nothing. In cross-examination he said that he tried to sell the property after his interview with Wood on the 14th of March, that he offered it to several persons, and he would not swear that he had not offered the property for sale at a much later period, or that he had not so offered it as late as the following September, or even the following February. He said that he had put the property into the

hands of the Dominion Land Company for sale and that he had not yet withdrawn it, but that he had not had any communication with them on the subject for a long time. It was admitted that Oliver was employed by the plaintiff to sell the property and that he was to have a commission of five per centum.

The plaintiff was examined under a commission, and in his evidence he says that he became the owner of the land on March 9th, and that he got his conveyance from Corbin on the same day. He says that Wood was acting for Corbin for the sale of the land till March 8th, when he employed Wood to act for him, gave him instructions, and sent him to Toronto.

I think the evidence establishes that Oliver was not the agent of the defendant Cooper, and that Wood was the agent of the plaintiff. Wood sent the telegram of March 8th on the same day that he became the plaintiff's agent, and ceased to be the agent of Corbin. The plaintiff, according to his own statement, was not the owner of the land at that time; but he refers the beginning of his ownership to the day on which he actually got the conveyance from Corbin. The telegrams to Wood of March 4th, and March 7th, were sent whilst he was the agent of Corbin. There might, for this reason (if there were none other), be difficulty in making out a contract from the telegrams. I think, however, that this need not be further discussed, as it seems to me that the defendant Cooper cannot be bound by them. I think those sent to Wood were only information forwarded to the vendor by his own agent that he had had the verbal offers of which they speak, and I think they may be laid out of the case. The receipt of March 9th does not contain the contract sued on, and, if any, another and different one at a different price, and I think this may be laid out of the case.

An effort was made by the defendant Oliver, in his evidence, to shew that his co-defendant Cooper was bound by his (Oliver's) signature to the paper, called conditions of sale, as auctioneer. He says, however, that the land

was sold by private sale, and not by auction, and I do not see how this effort can be successful. I think this document may also be laid out of the case.

Then, as to the deed of conveyance of March 14th. This was signed by the defendant Cooper and by Wood, who was at the time the agent of the plaintiff, although he told Cooper he was himself the owner of the land, and (impliedly) that he was acting for himself. He could not have been acting for himself, for it appears, I think, that he never had any interest in the land: his position was that of agent, first for Corbin and afterwards for the plaintiff. The deed acknowledges the receipt and payment of the \$5,000, purchase money. The evidence is that the money was not paid. It is admitted on the pleadings that only the deposit was paid, and there was no question raised as to this fact.

The question now arises whether or not this deed is a note or memorandum of a contract between the plaintiff and the defendant Cooper, the one sued on, sufficient to satisfy the requirements of the Statute of Frauds.

Oliver said this deed was left with Mr. Delamere, who was solicitor for the defendant Cooper. Mr. Sampson, however, says that Oliver must be mistaken as to this, because he afterwards got the deed from Mr. Murray, who, I understand was solicitor for Oliver or the vendor; at all events he was not the solicitor of the defendant Cooper.

Let it be supposed, first, that this deed was between the vendor and the purchaser without the intervention of any agent. In the case *Gillatley v. White*, 18 Gr. at p. 4 the late Chief Justice said: "I think that a contract of sale may be in the form of a conveyance. That which the parties intended to be a conveyance, but which is ineffectual to operate as a conveyance, may still be effectual to operate as a contract of sale, but, of course, it must contain all the terms which are necessary to a contract of sale in any other shape." In that case the position was taken that the deed was not perfectly executed by the vendor, who was defendant, but signed and sealed only, and the learned

Judge says, at p. 3 : " I do not think it makes any difference in this case which party is right upon this point. If there was a sufficient contract of sale the vendor is bound to carry it out." Further on the learned Judge says at p. 4 : " Suppose the contract had been that the purchase money should be paid in hand, I see nothing to prevent the *vendor* coming into Court upon such an instrument, effectual as a contract but not as a conveyance, praying specific performance, admitting that the admission which it contains of the payment of the purchase money was incorrect and submitting to pay it ; just as upon such an instrument, if the purchase money had been actually paid, he could allege it and pray for specific performance."

In this passage it seems that the word " vendor " is a misprint or some other mistake for the word " purchaser," but if such an instrument would be a good memorandum of the contract for either, it should, I think, be so for the other if signed by both. Further on the learned Judge again says, at p. 5 : " Looking at the conveyance by itself, it shows a contract of sale with the purchase money paid, and the vendor consequently a bare trustee to convey to the purchaser. To entitle the defendant to the consideration money we must look outside this contract of sale, viz., to the admission of the purchaser that it was still unpaid." The decree was for the plaintiff.

This case seems to me an authority for saying that a conveyance that has been signed and sealed but not delivered may, though incomplete as a conveyance, be good as a contract of purchase and sale ; and that where there is an admission that the purchase money was not paid, the statement, contrary to the fact, in the instrument that the purchase money was paid, does not stand in the way of relief upon it.

In the case *McClung v. McCracken*, 3 O. R. 596, the Chief Justice refers to this case, saying that the cases were widely different.

In *McClung v. McCracken*, the alleged contract was for an exchange of lands, and embraced other stipulations of

a monetary character. The instrument in question there was one signed by one of the parties only, and was in the form of a conveyance from her to the other party. It did not by recital or otherwise contain a statement of the alleged bargain, and did not in any way disclose the terms of it. Without a recital, or some statement beyond what is in the ordinary conveyance, it would show only one part of the contract. I think then there is authority for saying that if Wood had been the principal and the owner of the land, this incomplete conveyance signed as it is by both him and Cooper, would have been a writing sufficient within the meaning of the statute.

The plaintiff is not named or described in the document, but the evidence shows that Wood was his authorized agent for the sale of the land, and I think that in the sale he acted as such agent though he professed to be the owner, which he was not; and the question as to whether or not the plaintiff can under such circumstances avail himself of the benefit of the contract so made by Wood, is I think disposed of in the plaintiff's favour by the Queen's Bench Division in *McClung v. McCracken*, contrary to what I, for the time being, thought, by the opinion of the Court plainly expressed, though the judgment was upon another ground. In this way, and not being free from some doubts as to the questions of law, I think the plaintiff makes out his case notwithstanding the pleading setting up the statute.

It was contended that owing to the nature of the subject matter of the contract and what passed between the parties to it at the time it was made, that time was of its essence, and that Wood had full notice that the defendant Cooper so considered it, and that the delay in making out or shewing the title defeated whatever right the vendor had under it. After a consideration of the evidence and a perusal of the correspondence on the subject of the title, I am not of this opinion, and I think the plaintiff should succeed in his contention. No question was raised as to the jurisdiction, and I apprehend none could be sustained, or it would have been raised.

I think the plaintiff is entitled to judgment for specific performance of the contract, and that, as asked, there should be the usual reference as to title, this to be to the Master in Ordinary. I think the defendant Oliver is entitled to his commission and should pay the balance in his hands to the plaintiff. The plaintiff is entitled to his costs, as is usual in specific performance cases, against the defendant Cooper, and the defendant Cooper should pay the costs of his co-defendant Oliver; and the judgment is accordingly, reserving further directions and subsequent costs.

A. H. F. L.

This case has been carried to the Court of Appeal.

[CHANCERY DIVISION.]

BECHER V. HOARE ET AL.

Will—Mortmain Acts—Charity—Impure personality—Attempted ratification by heir of void bequest to charity.

H. S., by his will, bequeathed certain pure and impure personality to the London City Mission, a charitable organization, and died in 1865. In 1866 A. S., his heiress and next of kin, sent a signed writing to the executor of the will, in which, after reciting that doubts might arise whether the impure personality passed to the executor in trust for the charity, she declared her acquiescence in what she said she knew had been the testator's intention, viz., that the whole of the personality, pure and impure, should be treated by the executor as so passing to him, and renounced her rights thereto, and requested the executor to treat it all as so passing. In May, 1870, A. S. made a will devising and bequeathing all her real and personal property on certain trusts. In July, 1870, she informed the executor of H. S. that she had changed her intentions as to the matter referred to in the writing of 1866 above mentioned, and she forwarded another will, dated July, 1870, in which she bequeathed all the property she had as heiress and next of kin to H. S. to J. R., and appointed the same person her executor as was executor of the will of H. S. J. R. died before A. S. In 1869, and in March, 1870, A. S. had written letters to the secretary of the London City Mission, in which she had expressed her intention of carrying into effect the intentions of H. S., as expressed in his will. A. S. died in 1877, and probate of her first will of May, 1870, was granted to the executors named in it.

Held, that the impure personality could not pass by the will to the London City Mission, and the writing of 1866 and the letters to the London City Mission did not amount to such an assignment of it as would pass it to the charity, inasmuch as the requirements of the Mortmain Acts were not complied with: that a gift by will of property that failed to take effect by reason of the Mortmain Acts, could not be aided or set up by the party entitled to the property by anything less than what would be required to constitute a good gift by such party of the same property to the party intended to be benefited by the gift in the will.

There can be no marshalling of assets in favour of a charity.

As to the two wills of A. S., the bequest to J. R. by the second will lapsed by reason of her death before that of H. S., and the subject of it fell into the estate of A. S., so as to pass under the former will.

THIS was an action brought by Henry C. R. Becher, executor of the last will and testament of Henry Stoneman, deceased, against Joseph Hoare of the London City Mission, and Charles Hanlen Gamble, and T. John Pitts Tucker, executors of the last will and testament of Agnes Stoneman, deceased, claiming the interpretation of the will of the said Henry Stoneman, and a declaration of the rights and interests of the defendants under it, and that if

necessary the estate of Henry Stoneman might be administered.

The circumstances of the case are fully stated in the judgment.

The action was tried at the sittings of this division at London, on November 27th, 1883, before Ferguson, J.

Street, Q. C., for the plaintiff. There is no intestacy on the face of the will, and the Court leans against intestacy.

Magee, for the defendant Hoare. It is admitted that all except the Proof Line Road shares, and the Bank of Upper Canada shares and about \$30 of money were tainted with realty, and therefore would not pass to the charity by the will. But Agnes Stoneman admitted that the whole was intended to be given, and the document of July 31st, 1866, is virtually an assignment of the trust moneys held by the executor; Miss Stoneman had the will before her when she signed it, and it should be sufficient to overcome any difficulties in respect of the Statutes of Mortmain. I refer to *Strong v. Bird*, 18 Eq. 315; *Lambe v. Oxton*, 1 Dr. & S. 125; *Ellison v. Ellison*, 1 W. & T. L. C., 5th ed., p. 273, and notes thereto.

T. Macbeth for the other defendants. There can be no marshalling in favour of a charity: *Story's Eq. Jur.* secs. 569, 1180. Only the pure personality, the shares, passed by the will. The intention of the testator must be gathered from the will itself. There is no *latent ambiguity*. See *Taylor on Evid.*, 7th ed., vol. 2, p. 1022. The document of July 31st, 1866, is not a good assignment. It was only a direction, which was revocable until acted upon. There is no evidence that it was communicated to the mission, or that it was acted upon before it was revoked. The document is not a deed, and does not comply with Imp. 9 Geo. 2, ch. 36, sec. 1. There is only one witness, and no seal, and it has not been duly enrolled. If it is set up as an incomplete gift, there is no equity to assist it.

Street, Q. C., in reply, the executor should be protected by the document of July 31st, 1866, for he has paid out more money than the value of the shares, on the faith of that document.

July 2nd, 1884. FERGUSON, J.—This action is to obtain an interpretation of the last will of the late Rev. Henry Stoneman, who died on the eleventh day of November, 1865, at Woodhouse in the parish of Great Torrington in the county of Devon, England. The will bears date the 31st day of May, 1865, and by it the plaintiff is appointed executor. The will, after reciting that the testator was possessed of certain shares in the Bank of Upper Canada, and in the London Proof Line Road Company, (in Ontario,) and moneys, rights, and securities for money in Upper Canada, gave and bequeathed the said shares in the Bank of Upper Canada and in the London Proof Line Road Company to the plaintiff as such executor, upon trust, after payment of a certain legacy thereby bequeathed, out of the dividends, interest and income of the residue of such estate to pay to Agnes Stoneman the sister of the testator the annual sum of ten pounds, and to pay the said interest, dividends, and income of the said residue unto James Byrne Richards, and Jane his wife, and the survivor of them during their natural lives, and the life of such survivor, and from and after the decease of the said survivor to call in and convert into money a sufficient portion of the said residue for the purpose of paying certain other legacies thereby bequeathed. And the testator further directed by his said will as follows: "And after payment of the aforesaid legacies the said H. C. R. Becher, his executors, administrators, and assigns shall stand possessed of the residuary moneys, and the stocks, funds, and securities in or upon which the same shall for the time be invested, *in trust* to pay or transfer the same to the treasurer for the time being of the London City Mission, formed in London, England, on the 16th day of May, 1835 and to be applied towards the general purposes of the said

Mission in case my said sister shall not then be living; but in case she shall survive the said James Byrne Richards and Jane his wife, then upon trust, first, to set apart so much of the said residue as will produce the said annuity of ten pounds, and then to pay the said residue to the said treasurer, and to hold the said sum so set apart in trust to provide the same annuity during the life of my said sister, and after her death to pay the same to the treasurer for the time being of the London City Mission, to be applied in manner hereinbefore mentioned. And I hereby declare that my said trustee, his executors, administrators, or assigns, shall with the consent in writing of the said James Byrne Richards and Jane his wife, and the survivor of them, be empowered from time to time during their lives, and during the life of the survivors of them, and after the death of the survivor at his and their discretion, to vary the investment of the aforesaid shares into and for others of a like nature. But I hereby expressly declare that no such investment shall be made in the purchase of freehold or leasehold lands, or be laid out on mortgage of such, or in any way charged on real security, or any security which would invalidate the bequest hereinbefore made to The London City Mission."

On the 23rd day of April, 1866, probate of the will was granted to the plaintiff by the Surrogate Court of the county of Middlesex in Canada, and the plaintiff has ever since been and now is the personal representative of the said testator. At the time of his death the testator was the owner of one hundred and seven shares of the capital stock of the Bank of Upper Canada, at the par value of \$30 each, and of ninety shares of the capital stock of the London Proof Line Road Company of the value of \$20 each, and also of certain moneys secured by mortgage and otherwise upon real estate situated in the said county of Middlesex, and elsewhere in the province of Ontario, amounting to the sum of \$3,200, or thereabouts, and of the sum of \$30, or thereabouts, in cash.

It was admitted by counsel for all parties that all the property, excepting the shares in the London Proof Line Road Company, and in the capital stock of the Bank of Upper Canada and the \$30, so savoured of realty that it could not pass by the will to the London City Mission, and that these only were pure personality. It was also admitted that this mission was a voluntary charitable organization, and that the Bank of Upper Canada had failed.

The testator left him surviving neither widow nor father nor mother nor children nor descendants, and no brother or sister, save only his sister the said Agnes Stoneman, his only next of kin, and no child or children of any brother or sister.

On the 31st day of July, 1866, the said Agnes Stoneman having been informed that doubts might exist as to the construction of the will, signed and forwarded to the plaintiff a paper writing as follows:

"Whereas, under the last will and testament of the Rev. Henry Stoneman, deceased, probate whereof has been granted by Her Majesty's Surrogate Court of the county of Middlesex, in the Province of Ontario, Canada, to Henry C. R. Becher, Esq., therein named, doubts may arise whether the whole of the personal property and rights of the testator in Upper Canada, or whether the shares in the Bank of Upper Canada and in the Proof Line Road therein mentioned only passed to the said Henry C. R. Becher, in trust under the said will; and whereas the said Henry Stoneman died, leaving him surviving neither father nor mother nor wife, nor children, nor grandchildren, and no brother or sister, save only me, Agnes Stoneman, his only surviving sister and next of kin, and no children of any brother or sister; and I being desirous to remove any doubts as to the said will, knowing it was the intention of my brother, the said testator, that all his personal estate and rights in Canada should pass under the said will, do hereby declare my acquiescence in such intention, and that the whole of the said personal property and rights shall be dealt with and treated by the said executor as passing under the said will without question. And I, as next of kin, renounce my right thereto, hereby requesting the said executor to treat the same as passing under the said will, by and with my full concurrence that such is the proper and legal construction thereof."

On the 14th day of May, 1870, the said Agnes Stoneman duly made and published a will bearing that date,

whereby she devised and bequeathed all her real and personal estate unto her executors, the defendants Charles Hanlen Gamble and T. John Pitts Tucker, both of Barnstable, in the County of Devon, in England, upon trust to pay certain legacies out of the same, and to divide the residue amongst certain persons therein named. And in the month of July, in the same year (1870) she informed the plaintiff that she had changed her intentions with regard to the matters referred to in the writing signed by her of the 31st day of July, 1866, and forwarded to him (the plaintiff) a will duly executed by her, which is as follows :

"This is the last will and testament of me, Agnes Stoneman, of Woolfardisworthy, in the county of Devon, in the kingdom of England, spinster, of and concerning all property I have or may have in Canada, as only surviving next of kin and heiress-at-law of my brother Henry Stoneman. I give, devise and bequeath unto my cousin Mrs. Jane Richards, wife of James Byrne Richards, all property, both real and personal, and all my interest therein, whether present or in expectancy, that my said brother died seized or possessed of or interested in in the Dominion of Canada, or that he was in any way entitled to there, and which it may be held or considered was not wholly disposed of by his will, which said will is of his Canadian property, and bears date the 31st day of May, 1865, or as to which my said brother may be held to have been either wholly or partially intestate, and all and any other property or rights that I have or may have in Canada, to hold the same unto the said Jane Richards, her heirs, executors, administrators, and assigns, according to the nature of the said property forever. And I appoint Henry C. R. Becher, of the city of London, in Canada, Esquire, executor of my brother's said will, also executor of this my will."

This will bears date the 11th day of July, 1870.

The making of this will seems somewhat strange, as Agnes Stoneman had written three letters to the secretary of the London City Mission, one dated the 23rd of March, 1869, another the 5th of April, 1869, and another so late as the 4th of March, 1870, in all of which she expressed the intention of carrying into effect the intentions of her brother as expressed in his will. In the one of the 4th day of March, 1870, she said :

"I beg to call your attention to your letter to me of April the 6th last respecting a bequest from my late brother, Rev. H. Stoneman, to the

London City Mission, which was rendered void by the Statute of Mortmain, and as far as the residue of his property in Canada was concerned he died intestate. It would therefore be inherited by his heir-at-law. I stand in that position, being his only surviving near relative ; and being most desirous to carry out his intentions, I am advised to bequeath all that has become mine as heir-at-law to the London City Mission, and intend to make a will for that purpose ; but I must first have a guarantee in writing that all expenses attending the matter shall be defrayed by the society. I am informed the sum may amount to £370. If it may be considered worth having ; it will be considered very satisfactory to me to devote it to so good a cause."

In both the other letters she expressed a desire to carry out her brother's intentions, and spoke of the society paying the expenses of whatever was to be done to effect that object.

That she did, however, for some cause, change her mind, and make the will above referred to, is beyond all doubt. She died on the 26th day of August, 1877, and the probate of her will firstly above mentioned was duly granted to the defendants Charles H. Gamble and T. John Pitts Tucker.

Jane Richards died on the 8th day of January, 1876, and before the death of Agnes Stoneman, and James Byrne Richards died on the 30th day of August, 1881. The defendant Hoare was admitted to be the proper representative of the London City Mission. There was really no dispute as to the facts of the case. Few only of them were not admitted by the pleadings, and these were either admitted or proved beyond all question at the trial.

The plaintiff says that he has paid the legacies mentioned in the will of the late H. Stoneman, and is desirous of paying over the residue to the persons entitled thereto, but is advised that owing to the questions of law and fact arising under the will, he cannot safely proceed with the distribution of such residue until the rights of the defendants amongst themselves have been ascertained and declared ; and he asks that the will may be interpreted, and, if necessary, that the estate of the late Henry Stoneman may be administered.

It was said that some of the shares mentioned in the will of Henry Stoneman stood in the name of his wife. She, however, died, as was admitted, about eight months before his death, and apparently before the date of the execution of his will; and, as before stated, there were not any children. Besides, it is admitted by the pleadings that he was the owner of the shares.

There was some discussion at the trial as to whether or not any property was intended to be disposed of by the will of the Rev. H. Stoneman, except the shares in the Bank of Upper Canada, and in the London Proof Line Road Company, and the \$30 in money. The will is strangely drawn. In the view that I have taken of the case it seems immaterial whether or not it was intended that the property in Canada, other than these shares and the \$30 in money, was intended to pass under this will, for whether this was intended or not the conclusion will, in my opinion, be the same.

It was not contended that any interest in the property that savored of realty, called in the arguments "impure personality," could pass by the will to the London City Mission, but counsel for the defendant Hoare contended that it was the intention that this impure personality should pass by the will, and that the document of the 31st of July, 1866, signed by Agnes Stoneman, and her letters, above referred to, had the effect of an assignment to the London City Mission of such an interest in this impure personality as would have passed to them by the will but for the obstacle interposed by the provisions of the Mortmain Acts; and in support of this contention reliance was placed upon the cases of *Strong v. Bird*, 18 Eq. 315; *Lamb v. Oxton*, 1 Dr. & S. 125, and the notes to the case *Ellison v. Ellison*, in 1 *White and Tudor's Leading Cases*, 5th Ed., Vol. 1, p. 273.

I have perused these authorities, and I do not see how they support the contention. If the intention was that the impure personality should pass by the will of the Rev. H. Stoneman, the interest in this that was intended to

pass to the London City Mission, it is admitted, and it is, I think, clear, did not so pass by the will to them, and it became the property of Agnes Stoneman, the sole heiress-at-law, and sole next of kin of the testator H. Stoneman. If it was not intended that this impure personality should pass by the will, it would come to her as such sole heiress-at-law and sole next of kin; and the property being admittedly impure personality, and within the meaning, in this respect, of the Mortmain Acts, it could only, I think, be given by her to the London City Mission by observing the requirements of these Acts, which it is plain was not done. I am unable to perceive how a gift by will of property, that failed to take effect by reason of the Mortmain Acts, could be aided or set up by the party entitled to the property by anything less than what would be required to constitute a good gift by such party of the same property to the party intended to be benefited by the gift in the will. If what was done by Agnes Stoneman is put forward as a perfect gift to the London City Mission of this impure personality, the non-compliance with the provisions of the Mortmain Acts is an answer. If it is put forward as an imperfect gift, then there is no equity in favour of the London City Mission, who are volunteers, and the provisions of the same Acts also apply to the case.

I am of the opinion that the London City Mission is not entitled to any interest in or arising out of this impure personality (which is all the property mentioned or referred to in the will of the late Rev. H. Stoneman, excepting the stocks in the Bank of Upper Canada and in the London Line Road Company, and the \$30, or thereabouts, in cash). And I think there cannot be any marshalling of the assets. I think what is stated in the 569th section of *Story's Eq. Jur.* shows that this is entirely clear, and there are many authorities shewing that there can be no marshalling of assets in favour of charities.

Then as to the two wills of Agnes Stoneman. The first, dated the 14th day of May, 1870, professes to dispose of

all her property to the defendants Gamble and Tucker upon the trusts therein set forth. The second, of the 11th day of July, 1870, professes to dispose only of her property in Canada, giving the whole thereof to Jane Richards, and appointing the plaintiff executor. This gift, I think, lapsed, by reason of the death of Jane Richards before the death of the testatrix; and I think the subject of the gift fell into the estate of Agnes Stoneman, or rather never was taken away from that estate.

I am of the opinion that there was an intestacy of the Rev. Henry Stoneman in respect of all the property mentioned or referred to in his will of the 31st of July, 1865, except the Bank of Upper Canada stock and the London Proof Line Road Company stock and the \$30 in cash excepting so far as the appointment of an executor would prevent this: that if this will did embrace the impure personality, the provisions of the Mortmain Acts prevented the gift to the London City Mission from taking effect so far as it had relation to the impure personality; and that this gift, as to the impure personality, failed: that the common rule applies, and there can be no marshalling of the assets in favour of a charity. The residuary gift, if good, would be composed of the pure and impure personality, and as to the impure personality it failed.

I think there should be an administration of the assets, and for that purpose a reference to the Master at London.

It was agreed that the plaintiff, who acted as executor in the utmost good faith, and who, it was said, paid out more money than the value of the pure personality, should be protected, and he will be allowed in the accounts for all sums of money that he has paid. All parties should be paid their costs out of the estate.

Judgment accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

ZUMSTEIN V. HEDRICK ET AL.

Will—Devide to son who died before testator—R. S. O. ch. 106—Lapse.

H. made his will on October 10th, 1868, devising land to his son J., without words of limitation, and added a codicil on February 23rd, 1870, by which he confirmed the will save as changed by the codicil. J., the devisee, died February 17th, 1874, and H., the testator, died December 15th, 1879.

Held. That as the will was made and republished by the codicil prior to January 1st, 1874, the sections subsequent to sec. 7 of R. S. O. ch. 106, and among them sec. 35, did not apply, and that under the former law the devise to J. lapsed.

THIS was an action brought by Catherine Zumstein against Conrad Hedrick and others, in which the principal question to be decided was, the validity of a certain devise in the will of one Henry Hedrick.

The plaintiff's statement of claim set out that Henry Hedrick, the father of the plaintiff, died on December 15th, 1879, seized in fee of certain lands: that by will dated October 10th, 1868, he devised the said lands to his son John Hedrick, and made no provision for the death of the said John Hedrick in his lifetime, and there was no residuary devise of the said lands: that the said John Hedrick departed this life February 17th, 1874, leaving his widow and three children his only heirs at law: that the widow of the testator Henry Hedrick was dead: that John Hedrick in his lifetime duly made his will and devised the lands in question to his wife, who was in possession; and that by a codicil to his will, dated February 23rd, 1870, a certain legacy of \$60 was given by the testator (Henry Hedrick) to the plaintiff, charged upon the said lands, and that it had not been paid; and asked a sale of the lands and a distribution of the proceeds among those entitled.

The brothers and sisters of the plaintiff and the widow and three infant children of the deceased John Hedrick were all made parties defendant.

The action came on for trial at Sandwich, on November 18th, 1884, before Proudfoot, J.

Lash, Q. C., for the plaintiff. The devise lapsed, as the will was made before the Wills Act, 36 Vic., ch. 20, O.

White, for the defendant. There was no lapse. The will was republished in 1870. The Act of 1868, 32 Vic., c. 8, s. 1, O., assented to 19th December, 1868, makes the will speak from the date of the death. Improvements were also made on the land by John, who occupied it on the understanding that his father would give it to him; *Fitzgerald v. Fitzgerald*, 20 Gr. 410; *Garson v. Garson*, 3 O. R., 439.

Ellis appeared for the infants.

February, 18th 1885. PROUDFOOT, J.—I disposed of all the questions at the hearing in favour of the plaintiff, except that as to whether the devise to a son of the testator who predeceased him had lapsed.

Henry Hedrick made the will in question on the 10th October, 1868, devising the land to his son John without words of limitation, but subject to certain charges, which, without the aid of C. S. U. C., c. 82, s. 12, R. S. O., c. 106, s. 4, would have made it a devise in fee.

Henry Hedrick made a codicil to his will on the 23rd February, 1870, by which he confirmed his will save as changed by the codicil, which would amount to a republication of his will.

John, the devisee, died on the 17th February, 1874, leaving a widow and children.

Henry, the testator, died on 15th December, 1879.

The will was made before the 32 Vic., c. 8, O., was passed, 19th December, 1868; but the testator lived long enough to make subsequent statutes operate on his will.

The R. S. O., c. 106, ss. 26 and 8, enacted that the will of any person dying after the passing of the R. S. O. (31st December, 1877), should speak from the death of the testator. As the testator died in 1879 and his son John in 1874, the will would then, according to the defendant's contention, contain a devise to a person dead at the making of the will. In such a case, under the former

law, even words of limitation added, and I will consider them added here, were inoperative to let in the representatives of the deceased person: *Maybank v. Brooks*, 1 B. C. C., 84.

The R. S. O., c. 106, s. 7., enacts that the subsequent sections of the Act should not extend to any will made before the first of January, 1874. Among these sections is the 35th, which provided that a devise to a child of the testator who dies in the testator's life time leaving issue, any of whom shall survive the testator, shall not lapse, but shall take effect as if the devisee had died immediately after the testator. But this will was made and republished before the time fixed for this statute to apply (1st January, 1874), and therefore it is not governed by it, and the former law as to lapse rules. And under that law this devise has lapsed, and the plaintiff is entitled to succeed on all grounds of contention.

G. A. B.

[QUEEN'S BENCH DIVISION.]

STEWART V. SUTTON ET AL.

Action on mortgage—Judgment in former action—Defence of perjury—Pleading.

In an action on a mortgage from defendant S., the defendant H. being in possession, the latter claimed that plaintiff was bringing the action for the benefit of S., who was therefore, as well as the plaintiff, bound by a judgment in a former action, in which H., claiming title by possession, had succeeded against S. in having a lease from the latter to him set aside, the plaintiff, however, not being a party to the action, and having acquired his title prior thereto. S. pleaded that the judgment in question was obtained by the perjury of H., stating the perjury: *Held, on demurrer, good.*

THIS was a demurrer by the defendant Hillock to a statement of defence by the Suttons, which was in effect a reply to a claim by Hillock against the Suttons.

The action was by a mortgagee under a mortgage from the Suttons, Hillock being in possession.

Some time in March, 1882, Hillock, claiming title by possession, brought an action against the Suttons to have a lease declared improvident and set aside, which lease they had induced him to accept. In this he was successful.

In answer to his claim under the mortgage the defendant Hillock claimed that the plaintiff was bringing this action for the benefit of the Suttons, and that they, and therefore he, were bound by the judgment in the former suit, to which, however, the mortgagee was not made a party. He further claimed that if this was not so, he, the plaintiff, should be ordered to exhaust other securities held from the Suttons in relief of the land in question. The Suttons, in their statement of defence, set up that the judgment in the original action was obtained by the fraudulent concealment by Hillock of an agreement with the original owner, which would have defeated his title by length of possession, and perjury in denying the existence of any such agreement, which agreement was not known to the Suttons until after the time for moving against the original judgment had expired. To this Hillock demurred.

Myers, (of Orangeville) appeared for the demurrer.
J. Reeve, for the defendants Sutton and wife, contra.
Falconbridge, for the plaintiff.

March 10, 1885. ROSE, J.—The mortgage in question was made prior to the action by Hillock, and the mortgagee was not made a party to that action. He is therefore not bound by any finding there that Hillock had a title to the lands by possession.

Had it not been for the very strong language of Baggallay, L J., in *Hower v. Lloyd*, 10 Chy. D. 334, I should have thought the demurrer entitled to succeed on the authority of *Marriott v. Hampton*, 11 Sm. L. C., 8th ed., p. 421; *The Duchess of Kingston's Case*, same vol. p. 784; *De Medina v. Grove*, 10 Q. B. 152. Indeed, in *Hower v. Lloyd*, James and Thesiger, L JJ., express opinions quite fatal to the success of the contention of the Suttons.

Baggallay, L J., however, adds: "I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it will be proper to deal with cases, if and when any such shall arise, in which it shall be clearly proved that a judgment has been obtained by the fraud of one of the parties, which judgment but for such fraud would have been in favour of the other party." He adds, "I should much regret to feel myself compelled to hold that the Court had no power to deprive the successful but fraudulent party of the advantage to be derived from what he had so obtained by fraud."

As that was a separate action to impeach the judgment by fraud, and not a motion in the original cause, and as, in this action, if the alleged perjury, if committed, had not been committed, possibly Hillock would have failed in his former action, I think it will be well to let the case go down to trial on the pleadings, and have the facts determined. It may be that in this case the question that was left open in *Flower v. Lloyd* will be decided.

The demurrer will be overruled, costs in the cause; that is, if the plaintiff succeeds in the action he will have these costs added to his general costs against either or both defendants, as the case may be; if the Suttons succeed they will add these costs to their general costs; and so with Hillock.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

HOBBS ET AL. V. THE NORTHERN ASSURANCE CO.

Insurance—Explosion by gunpowder—Statutory conditions.

In an action on a fire policy, subject to the Statutory conditions, an accidental explosion of gunpowder appeared to have occurred, part of the damage occasioned thereby being due to the explosion itself, and part to the fire resulting therefrom.

Held, Armour, J., dissenting, that under Statutory condition No. 11 the defendants were liable only for the damage resulting from the fire, and not for that from the explosion.

ACTION on a fire policy, loss \$2,778.

The statement of claim set out that one of the conditions of the policy was: "The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning;" and that the policy was subject also to the ninth of the said statutory conditions, which was in the words following:

"In the event of any other insurance on property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage without reference to the dates of the different policies." The statement went on to allege, that at the time of the happening of the loss referred to there was a policy of

insurance, upon the same subject matter as that referred to in the statement of claim, in the Guardian Fire and Life Assurance Company of London, for \$7,000.

The whole damage done by fire to the insured property was \$694.50, whereof the proportion properly payable by the defendants was \$289.38.

The defendants brought into Court the said sum, and said it was sufficient to satisfy the claim of the plaintiffs; and that any damage done to the property above the said sum was caused directly by explosion of gunpowder upon the said premises, and not by fire.

Replication : That the whole of the loss sustained was sustained by fire, the said gunpowder having been ignited by fire, and such explosion being part of the consequences of such fire ; and that the sum paid into Court was not sufficient to satisfy the claim of the plaintiffs.

Issue.

The following statement of facts was agreed upon by the parties :

1. The statement of claim is admitted, excepting the words "by fire" in the 7th paragraph.

2. The property covered by the insurance in question was damaged and destroyed to the extent of \$2,778, on the 18th of February, 1884.

3. The loss was occasioned by some employees accidentally setting fire to some gunpowder stored in the premises insured. The loss by the explosion of gunpowder as distinguished from the after fire was \$2,088.50, and the loss by the after fire was \$694.50, which two sums make up the sum of \$2,778 referred to.

4. At the time of the happening of the said loss there was a policy of insurance upon the same subject matter as that referred to in the statement of claim, in the Guardian Fire and Life Assurance Company of London, for the sum of \$7,000, and the proportion of the said sum of \$694.50, payable by the defendants under the conditions in their said policy, was \$289.38, which sum the defendants have paid into Court.

5. The defendants deny their liability to the plaintiffs for the loss occasioned by the gunpowder being ignited, and by the explosion consequent thereon, save to the extent of the fire which ensued after the explosion, while the plaintiffs claim that the defendants are liable for the consequences of such explosion, as being part of the "fire" covered by the insurance ; and they claim that the defendants are bound to pay to the plaintiffs a sum bearing the same proportion to the sum of \$2,778, which the sum of \$5,000 bears to the sum of \$7,000.

The case was argued at the last Hilary Sittings.

February 4, 1885.—*Lount*, Q.C., and *Marsh*, for the defendants. The R. S. O., ch. 162, sec. 11, of the statutory conditions, makes Insurance Companies liable for injury resulting from explosion by coal gas, however caused, and the other words are : " and loss by fire caused by any other explosion, or by lightning." That section assumes that explosion by coal gas is an explosion caused by fire. They referred to *Everett v. The London Assurance Co.*, 19 C. B. N. S. 126; *Stanley v. The Western Ins. Co.*, L. R. 3 Ex. 71; *The United Life, Fire and Marine Ins. Co. v. Foote*, 10 Am. R. 735.

Gibbons, contra. An explosion is an ignition of itself. Here the fire was applied directly to the gunpowder. He referred to *Waters v. Merchants Louisville Ins. Co.*, 11 Peters 213, as a case similar to the present; *Citizens Ins. Co. of Canada v. Parsons*, L. R. 7 App. Cas. 121; *Scripture v. Lowell Mutual Fire Ins. Co.*, 10 Cushing 356.

Marsh, in reply. Explosion by coal gas must be by fire. The company is liable for loss caused by the explosion of coal gas; but that necessarily means the company is not liable for loss caused by any other explosion. In case of any other explosion than by coal gas the company is liable for the loss by fire which results or follows from that explosion. The case of *Boatman's Fire and Marine Ins. Co. v. Parker*, 23 Ohio 96, is very applicable here. The mention of dried fish was held to exclude pickled fish: *Baker v. Laidlaw*, 2 Johns. 89. Saving silk declared

free of duty was held not to extend to any other kind of silk: *Adams v. Bancroft*, 3 Sumners Circ. Rs. 387. Assignments of notes were held not to apply to other assignments: *Briggs v. French*, 2 Sumn. Circ. Rs. 257.

Insurance against loss by fire is not recoverable if the loss be by explosion caused by fire: *Stanley v. Western Assurance Co.*, L. R. 3 Ex. 71. There is a difference between explosion doing damage, though caused by fire, and an explosion which causes the fire: *The United Life, Fire, and Marine Insurance Co. v. Foote*, 10 Am. R. 735, 741-3.

He also referred to *Hare v. Horton*, 5 B. & Ad. 715; *Voorhees v. Presbyterian Church of Amsterdam*, 5 Howard's Pr. R. 71; *Vansteenbergh v. Kortz*, 10 Johns. 170; *Chautauqua County Bank v. White*, 6 Barb. 599; *Allan v. Dykers*, 3 Hill 593; *Blackburn v. Lavelle*, L. R. 6 App. Cas. 628, 634; *Everett v. London Ass. Co.*, 19 C. B. N. S. 126; *May on Ins.*, 2nd. ed., p. 621, commenting on the case in 10 *Cush.* 356.

March 7, 1885. WILSON, C. J.—The action of the plaintiff against the Guardian Fire Insurance Company was argued in the Common Pleas Division, and judgment given there.

The learned Chief Justice, on the same facts as in this case, was of opinion the plaintiffs were entitled to recover. The other learned Judges gave judgment for the defendants. See 7 O. R. 634.

"The term *explosion* is often rather loosely employed. It may, for our purpose, be defined as the sudden or extremely rapid conversion of a solid or liquid body of small bulk into gas or vapour occupying many times the volume of the original substance; and, in addition, highly expanded by the heat generated during the transformation. This sudden or very rapid expansion of volume is attended by an exhibition of force more or less violent, according to the constitution of the original substance and the circumstances of explosion. Any substance capable of

undergoing such a change upon the application of heat or other disturbing cause is called *explosive*：“Encyl. Brit. “*Explosives.*”

It may be caused by the application of an ignited or heated body—by percussion, concussion, or by friction. The term *explosion* signifies bursting out with a noise. A volcano may have an eruption, and at times may have an explosion ; gunpowder when ignited produces an explosion.

An explosion may be produced without the aid of heat or fire, as by the sudden liberation of air from an air gun ; by the expansion of gas in a balloon caused by the rising of the balloon into a higher atmosphere ; by the expansive force of any gas or vapour bursting its environment ; by the contact or mixture of some chemicals ; or by the concussion of nitro-glycerine or dynamite, in which last articles the union of the particles is very easily disturbed and trees often explode during a severe frost. Fire is perhaps the principal efficient cause of explosions.

The condition of the policy in question in this case is section 11 of the statutory conditions : “The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning.”

The loss in this case happened by an ignited match falling carelessly upon a keg of gunpowder, exploding the powder, and that explosion caused damage by means of the explosion only, and caused further damage by setting fire to some of the insured property.

The plaintiff claims for the loss caused by the explosion, because he says it was produced by the burning match, and he claims for the loss caused by the fire resulting from or produced by the explosion.

The defendants admit they are liable for the loss by the fire, which was caused by or resulted from the explosion ; but they say they are not liable for the damage done by the explosion itself, although that explosion was caused by the burning match, because they have contracted to pay ‘for loss caused by the explosion of coal gas’; that is, for

explosions, however caused, by coal gas only; so that any other kinds of explosions are not within these terms of the policy, and this was not an explosion of coal gas but of gunpowder; and that the remaining terms of the condition, the company will make good "loss by fire *caused by any other explosion, or by lightning,*" confirm the construction they contend should be put upon the earlier words—that the company will not pay for loss which is occasioned by *any other explosion*, however it may be caused, than a coal gas explosion, but they will pay for the loss which is *caused by* any other than a coal gas explosion, *if that other explosion causes or superinduces a fire, which fire produces damage.*

And so also they contend they are not liable to damage caused by lightning, but they will pay for any loss by fire *caused by* or resulting from that lightning.

I think the construction put upon the condition by the defendants is the proper one. The terms, in my opinion, are free from doubt.

An explosion of *coal gas* is plainly distinguished from *any other explosion*, and from *lightning*.

A loss by the former is to be paid for; a loss by the latter or by lightning is not to be paid for. But *if fire follow or result from any other than a coal gas explosion, or from lightning, the loss from that consequential fire is to be paid for, but only the loss from that fire.*

I have examined the cases to which we were referred.

In *Waters v. The Louisville Ins. Co.*, 11 Peters 213, the vessel was lost by the explosion of gunpowder from a lighted candle taken carelessly into the hold where the gunpowder was stowed, and it was held the insured was entitled to recover because the fire resulted from the lighted candle.

Scripture v. Lowell Marine & Fire Ins. Co., 10 Cush. 356, was like the preceding case.

In *The Boatman's Fire and Marine Ins. Co. v. Parker*, 23 Ohio 85, the policy contained a condition that the company would not be liable "for damage to property by lightning aside from fire * * * Nor for damage occa-

sioned by the explosion of a steam boiler, nor for damage by fire resulting from such explosion, nor explosion caused by gunpowder, gas, or other explosive substances :" " Held, the company was not exempt from liability for damage by fire *resulting* from an explosion of gas, but was exempted from damage occasioned by the explosion of gas which did not occasion fire."

In the case of *The United Life, Fire and Marine Ins Co. v. Foote*, 10 Am. R. 735, under a policy by which the company was not to be liable for any loss or damage to property consumed by fire happening by reason of or occasioned by any invasion &c., nor where the loss is occasioned by fraud, &c., nor for any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor—it was held the company was exempt from liability for a loss which was occasioned by an explosion of vapour arising from the process of rectifying whiskey.

The vapour escaped from the still and filled the still room, and coming in contact with a lighted gas-jet in the room an explosion followed ; and the Court was of opinion the ordinary gas-jet was not a fire within the intent and meaning of the policy.

In *Briggs v. North American and Mercantile Ins. Co.*, 53 N. Y. 446, the condition was : " The company shall not be liable for loss caused by invasion, &c., nor for loss caused by lightning, or explosions of any kind, unless fire ensues; then for the loss or damage by fire only." And it was held that the defendants had expressly guarded against liability for the damage caused by explosion of any kind, and there was no fire prior to the explosion. The vapour came in contact with a burning lamp used by the man in repairing the works for rectifying spirits, and it was held the lamp was not a fire within the terms of the policy.

In *Everett v. The London Assurance Co.*, 19 C. B. N. S. 126, the condition of the policy was " to pay for such loss

or damage as might be occasioned by fire to the property." The damage done was caused by an explosion of gunpowder which took place half a mile off, and it was held that the damage was not caused by fire in exploding the gunpowder.

In *Stanley v. The Western Ins. Co.*, L. R. 3 Ex. 71, the policy contained this exception : "Neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from an explosion by gas." The damage was occasioned by an inflammable and explosive vapour evolved in extracting oil from shoddy, which escaped and caught fire, setting fire to other things ; it afterwards exploded and caused a further fire, besides the damage done by the explosion : *Held*, that the company were protected against the damage which was caused by explosion, although the explosion originated from fire ; and also against loss by explosion which occurred in the course of a fire. Martin, B., said there was nothing to qualify the word *explosion*, and the company was not to be liable for any loss or damage by explosion.

The American cases are uniform that under a condition worded as the one last referred to, the company is responsible when the explosion is caused by fire, a lighted match or candle, or by the premises on which the gunpowder, gas, or vapour is, being on fire, and it does seem to me to be not an unreasonable construction ; but there is much to be said in favour of either view.

The conclusion I come to upon the terms of the condition is, that the defendants are not liable upon the facts submitted, and that the motion must be dismissed with costs.

ARMOUR, J.—By their policy the defendants have covenanted and agreed with the insured, that if the property insured, or any part thereof, shall be destroyed or damaged by fire, they will make good such loss or damage.

By *R. S. O. ch. 162, sec. 3.* "The conditions set forth in the schedule to this Act shall, *as against the insurers*, be deemed to be part of every policy of fire insurance hereafter entered into or renewed, or otherwise in force in

Ontario, with respect to any property therein, and shall be printed on every such policy, with the heading, 'Statutory Conditions.'

The statutory conditions are not, as a matter of fact, printed upon the policy sued on, but it is to be read, nevertheless, as against the insurers as if they formed part of it.

Section 11 of the said schedule is as follows: "The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works and loss by fire caused by any other explosion or by lightning."

The defendants are therefore under the liability which they have assumed by the contract they themselves have made, and they are also under the liability which the legislature has imposed upon them in section 11.

The liability which the Legislature has imposed upon them by section 11 was so imposed, not for their benefit, but for the benefit of the insured, as against them, and it was not intended to have, nor has it, nor should it be construed to have, the effect of restricting or lessening the liability which they have assumed by the contract they themselves have made, but of enlarging and adding to it.

If, therefore, the loss which the plaintiffs have sustained is within the terms of the liability the defendants have assumed by the contract they themselves have made, or if it is within the terms of the liability which the Legislature has imposed upon them, or if part of it is within the terms of one and part of it is within the terms of the other, the defendants are liable for it.

According to the case of *Scripture v. The Lowell Mutual Fire Ins Co.*, 10 Cush. 356, and other cases, the whole loss sustained by the plaintiffs is within the terms of the liability which the defendants have assumed by the contract they themselves have made, and they are therefore in my opinion liable for it, and judgment should be entered for the plaintiffs for the full amount of their loss and interest from the time when by the terms of the policy it is made payable, less the amount paid into Court, and the propor-

tions of the loss which, under the view I have taken, is properly payable by the Guardian Fire and Life Assurance Company, and together with the costs of this suit.

Were it not for the view I have taken I should have had much difficulty in holding that any part of the plaintiff's loss was a loss by fire caused by explosion within the meaning of section 11.

There may be an explosion caused by the application of fire to matter from which fire will ensue; there may be an explosion of matter, neither caused by the application of fire nor producing fire; and there may be an explosion of matter not caused by the application of fire but producing it, and in the latter case the fire so produced would be the only fire strictly within the words of section 11.

It is more than likely, however, that what the Legislature intended to provide for in section 11, by the use of the words "and loss by fire caused by any other explosion," was the case of an explosion (as for instance, of dynamite or steam,) which did not of itself produce fire, but which caused fire by breaking up and destroying vessels, and receptacles containing fire.

O'CONNOR, J.—The facts material for a decision in this case are stated in the judgments of the Chief Justice and my brother Armour.

The only point for decision is, whether by the terms of the policy of insurance, including the statutory conditions imposed by ch. 162, of the R. S. O., the defendants are liable for the loss or damage caused by the explosion of the gunpowder, as distinguished from the loss or damage caused by the fire which immediately resulted from the explosion.

Amongst the conditions indorsed on the policy respecting the damage which it is said the policy does not cover, is one which reads thus: "(i) Loss or damage by explosion, except loss or damage to a building, or to property contained therein, caused by explosion of coal gas in such building." I refer to this, to show that the policy contains a condition, apart from the statutory conditions, exempting

the defendants from liability for "loss or damage by *explosion*," except as therein is excepted. This exemption is not complained of under sec. 6 of the Act, and therefore it stands as a part and term of the contract between the parties. The policy, then, contains a general exemption of the defendants from liability for loss or damage by "explosion," subject only to any modification or exception provided by the statute, and by the condition indorsed on the policy itself, if it be not inconsistent with any of the conditions provided by the statute. It happens, however, that the exception attached to and forming part of the condition actually indorsed on the policy is substantially the same as one of the conditions provided by the statute so that no question arises in regard to that. The only condition contained in the schedule attached to the statute, which it is necessary to consider, is that which is numbered 11.

My brother Armour reads this clause of the conditions as part of the policy, but only *as against the insurers*, according to the express provision of the 3rd section of the statute itself; and in the absence of authority to the contrary, I would do likewise. But the Privy Council, in the case of the *Citizens Ins. Co. v. Parsons*, L. R. 7 App. Cas. 96, have decided otherwise. At page 120 that august tribunal says: "Such a construction leads to manifest absurdity, and to consequences which the Legislature could not have intended." I confess I am, at present, unable to see the absurdity; but the decision is of the Court of last resort, and is an authority binding on the Courts of this country, and the statute must be construed accordingly. The clause, then, must be read as part of the contract simply, as contained in or endorsed on the policy, and construed equally and fairly as part of the contract between the parties.

If the condition which is actually endorsed on the policy stood alone, namely, that the policy does not cover loss or damage by explosion, except loss or damage caused by explosion of coal gas, the case of *Stanley v. The Western*

Ins. Co., L. R. 3 Ex. 71, would be a clear authority against the plaintiff's right to recover, not only for loss or damage caused by the explosion, but also for loss or damage by fire caused by and immediately succeeding the explosion.

But I apprehend the condition ought to be read as composed partly of the condition actually endorsed on the policy, and the statutory clause 11, which in strictness ought to be, but is not so endorsed.

The condition ought, then, as I regard it, to read thus :

This policy does not cover—

(i.) Loss or damage by explosion, except loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion or by lightning, which loss or damage by the explosion of coal gas, and loss by fire caused by any other explosion or by lightning, the company will make good. This construction removes the case from the second part of the result of the decision in the case above cited (L. R. 3 Ex. 71); that is, the loss or damage by fire caused by the explosion, the explosion of gunpowder being other than explosion of coal gas; but the first branch of that decision is still applicable to the general rule of exclusion; that is, to loss or damage by explosion, but limited by the exceptions to that rule.

This construction furnishes, therefore, the general rule excluding loss or damage by explosion from the policy, and saving the company from liability on account of such loss or damage; and then follow the exceptions from that general rule—that is, loss caused by the explosion of coal gas, and loss by fire caused by any other explosion, &c.

It will be observed that a clear distinction between loss and damage caused by mere explosion and loss or damage by fire, which fire is caused by explosion, is presupposed and accepted.

This distinction has been established by a series of decisions of the Courts in England and in the United States, and it is recognized by text writers in both countries as part of the law relating to fire insurance policies in each country;

and it may be regarded as a distinction settled by law in those countries and in this also. It may, however, in some cases be difficult if not impossible to distinguish as a fact between the portion of the damage complained of which has been caused by an explosion merely, and that which has been done by fire caused by the explosion.

But no such difficulty is presented by this case, for the parties have agreed on the proportion of the damage which is to be attributed to the explosion, as distinguished from that which is to be attributed to the fire caused by the explosion.

In this view of the policy and the conditions thereof, I think I see my way clearly enough, with the light afforded by numerous cases decided heretofore, to a proper conclusion.

The case of *Scripture v. Lowell Mutual Fire Ins. Co.*, 10 Cushing (Mass.) 356, relied on for the plaintiff, is distinguishable from the present case, in this, that the policy of insurance in that case is stated to be the ordinary policy of insurance, insuring against loss or damage by fire. From this I infer, and the whole case as reported proceeds on the assumption, that the policy contained no clause excepting thereout loss by explosion or by fire caused by or resulting from explosion.

Were the policy in this case like the policy in that, I should unhesitatingly hold that case to be decisive of this case.

But the policy in question herein containing the condition adverted to is lifted thereby out of the class of policies commonly called ordinary fire insurance policies ; so that the case in 10 Cushing's Reports does not apply to it. The analysis of the learned Judge, in delivering the judgment of the Court in that case, of combustion produced by the ignition of gunpowder, and his comments on the phenomena produced from the application of the match to the gunpowder, the consequent explosion, and the resulting fire, to the several losses caused by the explosion and by the fire, and their resolution into one legal cause of the whole loss or damage, are scientifically interesting.

and in that case were useful, but they have no application to this case, because of the difference made by the condition.

The case of *Briggs v. North American and Mercantile Ins. Co.*, 53 N. Y. 446, is strictly analogous to the present case, involves the same principle, and may be regarded, in so far as the decision of a foreign Court may be considered authoritative, as decisive of this case. The policy excluded liability "for loss by lightning or explosion of any kind, unless fire ensues, and then for damage by fire only," and it was held, that as it appeared that vapour evolved from the material in process of manufacture, coming in contact with a burning lamp, exploded, tearing off the roof, shattering the walls, and damaging the machinery, upon which a fire supervened, that the insurers were liable for damage done by fire, but not for that done by the explosion.

There the explosion and the resulting fire, and the damage done by each, were as intimately connected as they were in this case. The *ratio decidendi* appears therefore to be the same in both cases; at least I am quite unable to point to any ground of distinction, or to conceive of any. The cases appear to agree in considering damage by explosion damage by force, and that it is immaterial how or by what that force was made active or put in motion, but that damage by fire is damage by combustion. That distinction is at the same time scientific, in accord with common sense, and an object of common knowledge.

The United Life, Fire and Marine Insurance Co. v. Foote, 22 Ohio State, 340, is another case having application to the present one. The judgment delivered by McIlvaine, J., is exceedingly able and instructive, as well as exhaustive of the subject: the reasoning is bold, clear, distinct, and, to my mind, conclusive. It is well worth a careful perusal. The cases of the *Norwich and New York Transportation Co. v. The Western Mass. Ins. Co.*, 34 Conn. 561, and *The Howard Fire Ins. Co. v. Norwich and N. Y. Transportation Co.*, 12 Wallace, 194, have also an important bearing on the present case, in the same direction.

The result is, that I am clearly of the opinion, that, though the gunpowder, being less than the quantity allowed, was lawfully in the building insured, the condition in question exempted the defendants from liability for loss or damage by the explosion of the gunpowder, as distinguished from the loss caused by the fire which was caused by and resulted from that explosion ; and that the defendants are liable for the latter loss only.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

LONGEWAY QUI. TAM V. AVISON ET AL.

Justice of Peace—Immediate return of conviction—Action for penalty.

In an action against two Justices of the Peace to recover a penalty for not making an immediate return of a conviction under R. S. O. ch. 76, Held, that it is a question for the jury whether, under the circumstances of any particular case, the return made is immediate, and that in a *qui tam* action the jury's finding for defendant should not be disturbed.

In this case the conviction was made on the 31st August, and the Magistrates withheld the return until the 15th September, expecting to receive the fine every day, and intending to return it with the conviction. The jury having been directed to find whether this was not "reasonably immediate" returned a verdict for defendants, which was upheld.

ACTION to recover a joint penalty of \$80 against two magistrates for failing to make an immediate return of a conviction, as required by R. S. O. ch. 76, sec. 1.

Defence :

1. That the defendants did make an immediate return of the said conviction as required by the said statute.
2. *Nunquam indebitatus.*

The case was tried at the Fall Assizes at Orangeville by Armour, J., and a jury, when the following facts appeared : The information was laid on the 24th day of August, 1888, against John Longeway, brother of the plaintiff, for a contravention of the Liquor License Act, and a fine of

\$20 and costs was imposed on the 31st day of August, and the conviction was made out accordingly on that day.

At the request of the defendant to give him five days to raise the money the defendant withheld the return of the conviction. The fine was not paid within the five days, and the defendants, still expecting to receive it every day, withheld the return until the 15th day of September, when the defendants having been served with a notice of application to quash the conviction, and concluding that it was not the intention to pay the fine, made the return on the latter day. The return was made in sufficient time to appear in the next publication of the list of convictions, so that it did not miss a publication.

The defendants shewed that their delay was occasioned by their expecting every day that the fine would be paid, when it was their intention to make a return of both the conviction and receipt of the fine, and thus avoid a double return, and as soon as they discovered that it was not the intention to pay the fine they returned the conviction.

The learned Judge left it to the jury to say whether or not (having regard to all the surrounding circumstances, and also the object of requiring an immediate return) the return was not "reasonably immediate." The jury found for the defendants.

At the November Sittings of this Court *McCarthy*, Q.C., obtained an order *nisi* to shew cause why the verdict and judgment should not be set aside and a new trial ordered, on the ground that there was no evidence that the defendants had made an immediate return of the conviction as required by law, and that there was error on the part of the learned Judge who tried the case in so charging the jury.

February 4, 1885. *Clements* supported the motion. The question is for the Court: *Cammell v. Beaver Ins. Co.*, 39 U. C. R. 1; and the learned Judge erred in leaving it to the jury. The word "immediately" has been held to mean "within a reasonable time, having regard to the

nature of the act to be done?" *Pybus v. Mitford*, 2 Levinz. 77; *Toms v. Wilson*, 4 B. & S. 442; *Griffith v. Tempest*, L. R. 2 C. P. D. 320; *Maxwell* on Statutes, 2d ed., 443, and cases cited. A return made after three weeks is not, having regard to the nature of the act to be done, an "immediate" return. Upon a proper construction of the statute it should be held that where the conviction is had before two justices they should sign the return before separating: *Atwood v. Rosser*, 30 C. P. 628.

Elgin Myers, (Orangeville,) contra. The effect of the plaintiff's contention is, that the word "immediate" excludes any interval of time, however short; in other words, that the conviction and the return are but one act, although they may be on separate pieces of paper. All the authorities however shew that the word is not an arbitrary term, but is of relative signification, and is never employed to describe an exact portion of time: *Abbott's Law Dictionary*, 1879, p. 581; *McClure v. Colclough*, 17 Al. 89 and 100. It is a word of no very definite signification and is in subjection to its connections. It should be construed as such convenient time as is requisite for doing a thing: *Thompson v. Gibson*, 8 M. & W. 288; *Snowball v. Dixon*, 4 Y. & C. 511. It is a more elastic term than the word "instantly," which even does not import entire absence of delay: *Abbott's Law Dictionary*, 629. It is even a more elastic term than "forthwith," which means a reasonable time: *Bamforth v. Rodden*, 14 Mass. 66. The first case here referring to the question is *O'Reilly v. Allan*, 11 U. C. R. 411, where it was queried whether or not the Court, if promptly applied to, would have stayed the action, it having been brought after the return was made. In *Kelly v. Cowan*, 18 U. C. R. 112, the Court intimated that if the case had gone to a jury and they had found that there was no culpable neglect, the Court would not have disturbed the verdict. In *McLellun v. Brown*, 12 C. P. 542 the conviction was on the 25th of September and the return on the 6th of December. It was left to the jury to say whether that was in a reasonable time, and the direction

was upheld, Consolidated Statute U. C. ch. 124 sec 1, consolidated 4 & 5 Vic. ch. 12 sec. 1, under which the above cases in our Courts were decided. The Law Reform Act, 1868-9 amended the consolidated statute by requiring all convictions, whether by one or two magistrates, to be returned at stated times in each year. The R. S. O. was passed re-enacting 4 & 5 Vic., under which *McLellan v. Brown* had been decided; therefore, the construction placed on the word in that case was adopted: *Crain v. Trustees of Coll. Institute, Ottawa*, 42 U. C. R. 48. Each Justice should have been proceeded against separately: *Metcalf v. Reid*, 9 U. C. R. 263; *Drake v. Preston*, 34 U. C. R. 65. *Attwood v. Rosser*, 30 C. P. 628, relied on by the other side is no authority. That case was decided on demurrer to a plea that the return had been made before the action brought, which was clearly bad.

March 7, 1885. O'CONNOR, J.—the first and subsequent sections of the Act which apply to this case are substantially the same as the corresponding sections of the old Act, ch. 124 of the Consol. Stat. of Upper Canada.

The sole question in this case is, what is meant by the expression, "an immediate return?" Was the return made by the defendants herein "an immediate return?"

The plaintiff says it was not an immediate return within the meaning of the Act, and he sues for the penalty.

No harm has been done by the delay—no interest, public or private, has been injured. Still, if the defendants have violated the law they must pay the penalty.

I think the law of this case was settled more than twenty years ago by the case *McLellan qui tam v. Brown*, 12 C. P. 542. In that case, tried before the late Sir John Beverley Robinson, Chief Justice of Upper Canada, it appeared that the conviction was made by two Justices of the Peace on 25th September, 1861, and the return was not made until the 6th December following, a period of more than two months.

The learned Chief Justice left it to the jury to say whether under the circumstances the return was immediate, which word he said meant, "within a reasonable period." Under that direction the jury rendered the verdict for the defendant. The verdict was moved against in the following Term, on the same ground as is taken in this case.

Draper, C. J., delivered the judgment of the Court, discharging the rule.

He approved of the way in which the question was left to the jury, and held that their finding for the defendant in an action such as this is final and conclusive.

In this case the learned Judge left it to the jury to say whether under the circumstances the defendants had made an immediate return, explaining that it meant "reasonably immediate." This direction was, I think, in effect the same as that given by the Chief Justice of Upper Canada in the former case. Under that direction, undoubtedly a proper one, the jury found for the defendants, and the Court will not disturb that finding. I think the order *nisi* should be discharged, with costs.

We were referred on the argument to the case of *Atwood qui tam v. Rosser et al.*, 30 C. P. 628, wherein Cameron, J., now Chief Justice of the Common Pleas, expressed an opinion that it was the intention of the Legislature that the Justices, after making a conviction, should before separating sign the return. But that is an *obiter dictum* not necessary to the decision of the point of law raised by the demurrer in that case, and it cannot be regarded as an authority against the decision of the Court directly given on the point. *McLellan qui tam v. Brown* has never been questioned as an authority, so far as I know, in any of the Courts. It has been for more than twenty years, and is still the leading case on the points involved in it, and is completely decisive of this case.

WILSON, C. J., and ARMOUR, J., concurred.

[CHANCERY DIVISION.]

KIDDER ET AL. V. SMART ET AL.

KIDDER ET AL. V. SMART MANUFACTURING COMPANY,
BROCKVILLE (LIMITED).

Patent—Reissue—Infringement—Delay in seeking reissue—Selling manufactured articles in this country with statement upon it that it is patented in the United States.

Held, that the delay (without any excuse) of a patentee for a period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a reissue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a reissue there), before the application for a reissue in this country, is fatal to the validity of the reissue here.

It is not illegal to manufacture and sell an article in this country which has been patented in the United States, and put upon it a statement that it is so patented, as a recommendation of it, so long as there is no infringement of a valid existing patent in this country.

THESE were actions brought by G. R. Kidder and A. D. Taylor, the one against E. Smart, A. Smart, and B. C. Shepherd, and the other against the Smart Manufacturing Company, claiming damages in respect of an alleged infringement by the defendants of a certain re-issued patent bearing date March 31st, 1881, obtained by the plaintiff G. R. Kidder, for a new manufacture known as "Kidder's Sliding Door," whereof he claimed to be the first and true inventor, and in which patent and invention Kidder had, by indentures bearing date January 7th, 1881, and November 15th, 1881, granted an undivided one-half interest to his co-defendant Taylor. The plaintiffs also claimed an injunction to restrain future infringements, an account of profits received by the defendants from the sale of the patented machines, and further relief.

The facts of the case are fully stated in the judgment

The two actions depending upon the same state of facts were tried together.

The trial took place on October 27th 1882, at Brockville, before Ferguson, J.

B. B. Osler, Q. C., and *R. R. Waddell*, for the plaintiffs, referred to the Patent Act of 1872, 35 Vic. c. 26, D., secs. 28; *Waterous v. Bishop*, 20 C. P. 29; *Losh v. Hague*, Webs. Pat. Cas., Vol. 1., p. 202.

C. Moss, Q. C., and *E. J. Reynolds*, for the defendants. The patent on which the plaintiffs can alone succeed is the re-issued patent of 1881. See Patent Act of 1872, sec. 19. But the expiration of a year after the re-issue in the United States before the re-issue here is fatal. The application for the re-issue was too late. The plaintiff after knowledge brought home to him by his own statement waited two years, or nearly two years, before he came for a re-issue. If it is necessary to invoke sec. 48 of the Patent Act of 1872, it applies.

B. B. Osler, in reply. If the claims in the re-issue are fairly indicated in the original application, the decision of the commissioner in granting a re-issue is final: sec. 19 of Act of 1872. The re-issue is good as from the date of the original patent: *Withrow v. Malcolm*, 6 O. R. 12.

February 21st, 1884. FERGUSON, J.—The action is for alleged infringements of a patent bearing date the 10th day of July, 1878, granted to the plaintiff Kidder, for an invention called in the patent "Kidder's Sliding Door." The plaintiff Taylor is an assignee of a share in the patent. As I glean from the evidence, and as seems to be admitted by the plaintiff Kidder in his evidence, there was in common use before the time of the alleged invention a sliding door somewhat like the one in respect of which the patent is, suspended by pulleys running upon a bar (called a platform), the contrivance to prevent the pulleys from leaving the track or bar being a groove on the underside of the bar into which was inserted the upper edge of the leaf of the door. The pulleys run upon the upper side of the bar or rail, and were made fast to the hand of the hanger, which

was fastened to the leaf of the door at such a distance as to keep the upper edge of the leaf within the groove on the under side of the rail, apparently making the whole secure in such a way that the door would slide lengthwise of the bar on which ran the pulleys without fear of displacement, at right angles to the bar. Much evidence was given in respect of grooved pulleys having been used running upon an iron track fastened to and upon the upper side of the bar, and the difference (reduction) in cost by having the flat pulleys running upon the flat surface of the bar. This does not seem to be material, as the plaintiff Kidder does not claim as or as any part of his alleged invention the flat pulley. Evidence was also given of many kinds of door hangers, and a large number of metal and wooden devices and copies of devices produced at the trial, many of which appeared to be unnecessary for the purposes of what was really to be considered in the suit.

According to the plaintiff Kidder's view as indicated in his evidence, there were two difficulties to be overcome, one being the friction occasioned by the sliding of the door, the upper edge of the leaf of which was in the groove on the under side of the bar; the other being the "binding" occasioned by the warping of the leaf of the door, the upper edge of which was in the groove. The plaintiff Kidder in his own evidence says: "The effect of my invention is, that it overcomes friction (in part) and the binding by reason of the warping of the door."

In the patent the description of the claim is this: "It consists 1st, in a sliding door or gate, the combination of the hangers B. B., with the door or gate A., pulley C. C., and elevated platform A.; 2nd, in the combination of the door or gate A., platform a., hangers B. B., pulleys C. C., and bent on angular bar D., provided with a frictional roller D." At or before the time of the issue of the patent in Canada a patent was obtained by the plaintiff Kidder in the United States for the same alleged invention, the claim, as I understand, being described in the same way as in the Canadian patent. On the 8th day of July, 1879, he obtained a re-issue of his

patent in the United States, and on the 31st day of March, 1881, he obtained a re-issue of his patent in Canada, the same as the re-issue in the United States. The evidence of the fact of the issue of the patent and the re-issue of the same in the United States was given by him in his cross-examination without objection. Afterwards during the argument, counsel for the defence did contend that the re-issue of the patent in the United States had not been properly proved, but the fact having been stated by the plaintiff Kidder, and by his solicitor in the United States (who was called as a witness), without objection, I think I must act upon it.

The description of the claim in the re-issued patent is this : "It consists, 1st, in a sliding door or gate the combination of the hangers B. B., with the door or gate A., pulleys C. C., and elevated track or platform "a;" 2nd, in the door or gate A., platform "a," hangers B.B., pulleys C.C. and bent angular bar D., provided with a frictional roller "d," in combination as set forth ; 3rd, in a door or gate hanger composed of a bracket adapted to be secured to the face of the door, which bracket has an arm upon which is pivoted a flat faced wheel or pulley which supports and carries the door, and has also an arm with a guide or roller adapted in connection with a suitable groove or guide in the under-side of the track, to prevent the door from displacement at right angles to the track ; 4th, In combination with a hanger provided with a vertical flat faced bearing wheel and a guide, the platform or plate "a," provided with a groove on its under side to receive the guide." The plaintiff, Kidder, in his evidence said, (speaking I think with reference to the original patent in this country) that he did not claim to have invented the door, nor the pulleys, nor the elevated platform, nor the hanger ; that the claim was for the combination of these four. He further said that this combination has not been manufactured by the plaintiffs in this country, and that the hanger only has been made by the plaintiffs in this country.

Mr. George H. Sothram, an attorney-at-law in the State

of Michigan, was called by the plaintiffs. According to his evidence he had a very considerable experience in patents and inventions in the United States. He was advising counsel of the plaintiffs in that country. He says that in the year 1879 the plaintiff Kidder came to him and stated what his invention was, and that he advised Kidder that his patent did not embrace what he said was his invention, and that he obtained the re-issue of the patent for the plaintiffs in the United States, and that shortly after this he drew specifications and claim for the re-issue of the plaintiffs' patent in Canada. He says that he found from the original patent that the hanger was not sufficiently described, and that the attorney who issued the patent had only a combination, of which the hanger was one element. He says he thought that no manufacturer would manufacture the whole door, but only the hanger, and he therefore drafted the third claim in the re-issued patent.

The only charge sought to be made out against the defendants is an infringement of this third claim in the re-issued patent in Canada, by the manufacture of a hanger. It was not contended that there was any infringement of any of the claims in the original patent in Canada, and as already stated the plaintiff Kidder said that there had been no manufacture in Canada of the combinations claimed in that patent, or of any of them, though more than two years had elapsed after the date of the original patent and the time of the application for the re-issue of it. The defendants, among other defences, set up this want of manufacture in Canada within the stated period as a defence under the 28th section of the Act of 1872. Upon the argument a question of pleading was raised, and to avoid any trouble as to an amendment, it was admitted by the counsel for the plaintiffs that the question of the technical invalidity of the re-issue of the Canadian patent had been sufficiently raised by the pleadings. The date of the issue of the original patent, as has been stated, was the 10th day of July, 1878. The original United States patent was issued at or prior to that date. The re-issue of the United

States patent was on the 8th day of July, 1879. It is entirely clear from the evidence that at this date the plaintiff Kidder, assuming that the original Canadian patent was defective by reason of a mistake of himself or of his attorney who had procured the issue of it, had then, that is on the 8th of July, 1879, full notice and knowledge of the mistake, and yet the re-issue in Canada was not applied for and obtained till the 31st of March, 1881. It also appears that during this space of time manufacture under the re-issue in the United States was going on in that country, the re-issued patent in the United States being, as the plaintiff Kidder says, precisely the same as the re-issued patent here. In his evidence the plaintiff Kidder says: "For nearly two years after my making the discovery of the insufficiency of the patents, I did not apply for a re-issue in Canada. It seems that I let the matter lie for nearly two years before applying for a re-issue in Canada," and upon being asked by counsel what excuse he had to offer for this delay, he said he had none whatever.

There are many cases in the United States in which re-issued patents have been held good notwithstanding the lapse of a number of years after the issue of the original patent, and before the application for the re-issue. A number of these cases is referred to in the case *Withrow v. Malcolm*, 6 O. R. 12, lately before this Division of the Court. One case is mentioned in *Bump* on Patent Law, at p. 173, in which sixteen years so elapsed, but it does not appear that these long periods elapsed after the discovery of the alleged mistake, and before the application for the re-issue. In the case above referred to the learned Chancellor refers with approval to the case (amongst many others upon the subject) *Miller v. Bridgeport Gas Co.*, 21 U. S Off. Gaz. 201; S. C. 104 U. S. R. 350, and the language of Mr. Justice Bradley therein, where he says: "If a patentee who has no corrections to suggest in his specification, except to make his claim broader and more comprehensive, uses due diligence in returning to the patent office and says:

'I omitted this,' or 'my solicitor did not understand that,' his application may be entertained, and, on a proper showing, correction may be made. * * Nothing but a clear mistake or inadvertence, and a speedy application for its correction is admissible when it is sought merely to enlarge the claim." (The re-issue in the present case simply broadens or enlarges the claim). Further on Chief Justice Bradley says: "But in reference to re-issues made for the purpose of enlarging the scope of the patent, the rule of *laches* should be strictly applied, and no one should be relieved who has slept upon his rights, and has thus led the public to rely upon the implied disclaimer involved in the terms of the original patent; and when this is a matter apparent on the face of the instrument, upon a mere comparison of the original patent with the re-issue, it is competent for the Courts to decide whether the delay was unreasonable, and whether the re-issue was therefore contrary to law and void."

There are many cases to the same effect as this one. The conclusion at which I have arrived after the best consideration I have been able to give the case, is, that the delay (without any excuse whatever) of the patentee, for a period of nearly two years after full notice and knowledge of the alleged inadvertence or mistake in his original patent, and after professional advice on the subject, and after a re-issue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture was carried on in the United States under the re-issue there) before the application for a re-issue in this country, is fatal to the validity of the re-issued patent in Canada. It may also be added that during this period the defendants were manufacturing in Canada the articles the manufacture of which is complained of by the plaintiffs. If this conduct of the plaintiffs can be called diligence or promptitude, it is difficult to conceive what could be chartered as laches or the reverse of promptitude. It was urged in argument that the defendants had used the plaintiff Kidder's name and a reference to his patent upon articles

of their manufacture, and were selling the same so marked or stamped, and that this was cogent evidence in favour of the plaintiffs. An examination of the exhibits in connection with the dates of the patents shows that what was done by the defendants was to manufacture and sell an article having the name Kidder and a reference to his United States patent marked upon it. I do not see that it is wrong to manufacture and sell an article in this country which has been patented in the United States, and put upon it a statement that it is so patented as a recommendation of it, so long as there is no infringement of a valid existing patent in this country. If the name of the plaintiff Kidder has been wrongfully and unlawfully used in trade by the defendants, that is another matter, and one with which I have here no concern.

I am of the opinion that the action should be dismissed, with costs.

**KIDDER V. THE SMART MANUFACTURING COMPANY,
(LIMITED).**

THIS action was tried with the one above, and depended upon the same state of facts, excepting that the Smart Manufacturing Co. had its commencement on the 29th day of April, 1881, and they were sued in respect of manufactures after that date which were alleged to be infringements, and in the other suit the manufactures complained of as infringements were before that date.

I am of the opinion that this action should also be dismissed, with costs.

Both actions dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION].

MILL v. MILL.

Infant—Costs against next friend.

Where one commenced an action as next friend to an infant to restrain waste on the infant's property without any notice to the defendant, and without any investigation as to the good reasons which the defendant had for acting in the manner complained of,
Held, that the next friend should pay the costs.

THIS was an action brought by Charles Clifford Mill by James A. Thomas, his next friend, against Maria Jane Mill, for an injunction to restrain the defendant from committing waste on the plaintiff's property by removing timber, and otherwise, and for an account of the rents and profits of the lands received by the defendant by such waste committed since November, 1882.

The statement of claim alleged that the plaintiff was eight years of age, and that James A. Thomas was his brother-in-law.

The statement of defence alleged that Thomas was not related to the plaintiff, but had always been a stranger to the estate in question, and the plaintiff's person and estate generally; that the action was brought by Thomas against the true interests of the plaintiff, and for the purpose of advancing his, Thomas's, own interests, and out of a litigious spirit and disposition and desire to harass and annoy the defendant; and that the defendant was the mother of the plaintiff residing with the plaintiff on the land, and executrix under the will of the plaintiff's father, and had managed the estate in a proper and careful manner and in the interests of all parties entitled thereto, and had committed no waste on the land in question since November, 1882.

The action was tried at London, on April 23rd, 1884.

Meredith, Q. C., and Sanderson, for the plaintiff.
R. M. Meredith and E. Meredith, for the defendant.

At the trial the defendant undertook to clear up a certain portion of the land in question, and fit it for pasture, and to account for the proceeds of the wood cut and profits received, and the learned Chancellor thereupon directed the intervention of the official guardian, and said he would give costs against the next friend, under the circumstances of this action, unless upon further consideration he changed his view as to this.

Golds v. Kerr, W. N. 1884, p. 46; *Drake v. Wigle*, 24 C. P. 408; and *Lauder v. Hawkins*, 2 M. & K. 243, were cited.

Afterwards, on April 30th, 1884, he gave judgment as follows:

April 30th, 1884.—BOYD, C. I think the next friend will have to pay the defendant's costs. *Golds v. Kerr*, W. N., 1884, p. 46, cited by Mr. Meredith, is very much in point. The action was begun without any notice to the defendant, and without any investigation as to the good reasons that the defendant had for acting in the manner complained of. I direct the intervention of the official guardian, who will see that the proceeds of the trees cut is properly accounted for, and that the defendant completes what is required to make the three acres cleared fit for pasture land.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE BIGGAR—BIGGAR ET AL. V. STINSON ET AL.

Will—Construction—Concurrent gift to parents and children—“Heirs”—Guardian of legacy—Trust—Dover—Election—Bequest of annuity to widow.

A testator, after bequeathing to his wife his dwelling house, and furniture, and an annuity, continued as follows:—"I give and bequeath unto G. B., and her children, the dwelling house they now occupy, the wife of C. R. B., and his children, appointing C. R. B., and G. B., joint guardians for the children above mentioned, and \$500, all transactions to be null and void unless sustained in writing by both guardians." And in the 10th clause of his will he said: "I will and bequeath unto each of my grand-children living at my death \$100."

C. R. B. was a son of the testator, and had children living at the testator's death.

Held, that the children meant were those of C. R. B., and G. B., and there was a simple gift to G. B., and her children, who took concurrently; and C. R. B., and G. B. were, by the above clause, made trustees for their children, and could give a good acquittance and discharge for the \$500, but they were not authorized to receive, and could not give a good acquittance for the moneys bequeathed to their children in the 10th clause.

In another clause of his will the testator willed and bequeathed "unto G. G. B.'s wife, E. B., \$5,500. This bequest is under the joint management to G. G. B., and his wife for their heirs, should there be none, then at their death to revert back to my heirs to be equally divided."

Held, that there was a trust of the \$5,500 reposed in G. G. B. and E. B.; that E. B. was entitled to the benefit of the trust during her life, and upon her death the benefit of it would go to any children there might be of G. G. and E. B., or any descendants there might be answering the description, "their heirs," and if there were no such children or descendants, then to the heirs of the testator, to be equally divided amongst them.

Another clause was as follows:

"I will and bequeath unto M. R. B.'s wife and his heirs \$5,000, and appoint M. R. B. as guardian and manager of this bequest."

Held, that a trust of the \$5,000 was thereby reposed in M. R. B. and "heirs" was merely descriptive of the legatees intended. M. R. B. was entitled to receive the fund and hold it in trust. During his life his wife would be entitled to the whole benefit arising from the fund, and on his death there would be a distribution of it amongst his wife or her representatives, as the case might be, and those persons who would answer the description of heirs of M. R. B., and M. R. B. as such trustee was entitled to receive and could give a good acquittance and discharge for the money.

Held, lastly, that under the will in question the widow was not put to her election.

THIS was an action for the construction of the will of Hamilton Biggar deceased. The action was brought by the executors and executrix, and the defendants were the widow and children and grand-children of the testator.

The provisions of the will are stated at length in the judgment.

The matter came up on motion for judgment on December 19th, 1883, before Ferguson, J.

H. M. Wilson, Q. C., for the plaintiffs. The gift to Ann Stinson of the house in which she lived at the date of the will, and at the death of the testator, shews that the intention was, that the widow should not have both legacies and dower; so does the last clause directing the sale of the residue of the lands: *McLennan v. Grant*, 15 Gr. 65; *Hutchinson v. Sargent*, 16 Gr. 78; *Coleman v. Glanville*, 18 Gr. 42.

A. Hoskin, Q.C., for the widow. The widow is not put to her election: *Holdich v. Holdich*, 2 Y. & C. 18; *Hall v. Hill*, 1 Dru. & W. 94; *Ellis v. Lewis*, 3 Ha. 310; *Gibson v. Gibson*, 1 Drew. 42; *O'Hara v. Chaine*, 1 J. & Lat. 662

V. McKenzie, Q.C., for the adult defendants other than the widow. As to the 8th clause of the will, this gives the \$5500 to George G. Biggar and Edith Biggar absolutely subject to its being divested upon their dying without issue. As to the 9th clause, the words used would confer an estate tail in land in the wife of Miles R. Biggar, and therefore amount to an absolute gift to her of the \$5000. See *Herrick v. Franklin*, 6 Eq. 593; *Andsley v. Horn*, 26 Beav. 195; *Ellis v. Lewis*, 3 Ha. 310; *Coote's Prob. Prac.*, 9th ed., 131; *Jarm. on Wills*, 4th ed., vol. 2, p. 72-74.

J. Hoskin, Q.C., for the infant defendants. As to clause 8, when a legacy is given to a man and his heirs he takes absolutely: *Theob. on Wills*, 2nd ed., 371; *Seale v. Seale*, 1 P. Wm. 290. As to the question of dower, the authorities show the widow is not put to her election: *Theob. on Wills*, 2nd ed., p. 89; *Lapp v. Lapp*, 16 Gr. 159; *Murphy v. Murphy*, 20 Gr. 575. As to the 9th clause, the wife of M. R. Biggar and the children of her husband take as tenants in common. In dealing with personal estate "heirs" means "children": *Williams on Exrs.* 7th ed., p. 1112; *Jarm. on Wills*, 4th ed., vol. 2, p. 76; *Hawkins on*

Wills, Eng. ed., p. 94; *Gundry v. Pinniger*, 1 DeG. M. & G. 502. "Guardian and manager of this bequest" make M. R. Biggar trustee. I also refer to *Theob.* on Wills, 2nd ed., p., 317; *Ex parte Wynch*, 5 DeG. M. & G. 188; *Buffar v. Bradford*, 2 Atk. 221.

June 12th, 1884. FERGUSON, J.—The action is brought by the executrix and executors of the last will of the late Hamilton Biggar. They ask to have the will interpreted and the trusts and manner of administration thereof declared, and the rights and interests of all parties to the suit ascertained and declared.

The several clauses of the will are as follows:

"Firstly—I give and bequeath unto my beloved wife Eliza Biggar my dwelling in which we now live during her natural life, all my household goods and furniture of every description, and three hundred dollars a year, which shall be secured to her out of my estate, and at her death to be sold and the proceeds to be equally divided among my heirs.

"Secondly—I give and bequeath unto my daughter Ann Stinson the dwelling she now occupies, being the north half of a double brick house on west street, Biggar tract, in the city of Brantford, and three thousand five hundred and fifty dollars in memory of Georgie Stinson now dead. The above bequests are for her sole benefit, and all bequests made to her children are under her control.

"Thirdly—I will and bequeath unto my daughter Julia E. Ditch the lot now occupied by Mrs. Fair in the Biggar tract in the city of Brantford, and also the adjoining lot, and one thousand five hundred dollars, and the two notes of five hundred dollars against W. H. Ditch, the above bequests at her sole control and for her sole benefit.

"Fourthly—I give and bequeath unto Grace Biggar and her children the dwelling house they now occupy, being the south half of a double brick dwelling on West street, Biggar tract, city of Brantford, the wife of Charles R. Biggar, and his children, appointing Charles R. Biggar and Grace Biggar joint guardians for the children above mentioned, and five hundred dollars, all transactions to be null and void unless sanctioned in writing by both guardians.

"Fifthly—I will and bequeath unto my son Hamilton Biggar two thousand five hundred dollars.

"Sixthly—I will and bequeath unto my daughter Fanny C. Biggar one-half interest in my building north side Colborne street in the city of Brantford, and now occupied by James Feeny, James Creyk and J. E. McMichael, and one thousand dollars.

"Seventhly—I will and bequeath unto my daughter Georgie S. Nelles one-half interest in my building north side of Colborne street in the city of Brantford and now occupied by James Feeny, James Creyk and J. E. McMichael, and one thousand dollars.

"Eighthly—I will and bequeath unto my son George G. Biggar's wife, Edith Biggar, the premises, house and lot they now occupy in the town of Geneva, in the state of Ohio, U. S., and five thousand five hundred dollars. This bequest is under the joint management of G. G. Biggar and his wife for their heirs; should there be none, then at their death to revert back to my heirs to be equally divided.

"Ninthly—I will and bequeath unto my son Miles R. Biggar's wife and his heirs five thousand dollars, and appoint Miles R. Biggar as guardian and manager of this bequest.

"Tenthly—I will and bequeath unto each of my grandchildren living at the time of my death one hundred dollars, and to Hamilton Bradshaw fifty dollars. To the superannuation fund of the Methodist church five hundred dollars, and one hundred dollars to the Missionary Society of the same church.

"All lands not mentioned in my will to be sold, and the proceeds equally divided among my children. No accounts to be presented by my children against my estate. Should any they forfeit their portion, or any litigation unnecessary will do the same."

Then follows the clause appointing the executrix and executors. There is a codicil appointing additional executors, but it is immaterial to the purposes of this action. The will is dated August 10th, 1881; the codicil in February, 1883. The testator died on the 20th day of February, 1883, leaving him surviving his widow, Eliza Phelps Biggar, his four sons, Charles R. Biggar, Hamilton Fisk Biggar, George G. Biggar and Miles Racey Biggar, and his four daughters, Ann Stinson, Julia E. Ditch, Fanny C Biggar and Georgie S. Nelles, also Frank McKay Biggar, Agnes Eliza Biggar, and an unnamed daughter; children of Charles R. Biggar and Grace Biggar, and Miles Arthur

Frederick Biggar, the son of Miles R. Biggar and Sylphia P. Biggar. But he (the testator) did not leave him surviving any grand-children the children of his son George G. Biggar and Edith Biggar his wife.

The plaintiffs say that it is doubtful whether under the 4th clause of the will Grace Biggar and Charles R. Biggar therein named are authorized and entitled to receive and give a discharge for the sum of five hundred dollars therein bequeathed and that it is doubtful whether the said Charles R. Biggar and Grace Biggar are entitled to receive and give a discharge for the moneys by the 10th clause of the will bequeathed to their children, grand-children of the testator. They also say it is doubtful what interest the said Edith Biggar takes or acquires in the real estate devised by the 8th clause of the will, and that it is doubtful whether the said George G. Biggar and Edith Biggar his wife, are authorized and entitled to receive and give a discharge for the sum of \$5,500 by the said 8th clause bequeathed and declared to be under their joint management for their heirs, and should there be none, then to revert to the heirs of the testator. They also say that under the 9th clause of the will it is doubtful whether Miles R. Biggar is authorized and entitled to receive and give a discharge for the legacy of \$5,000 thereby bequeathed to the said Miles R. Biggar's wife and *his heirs*. And that it is doubtful whether the widow of the testator is entitled to her dower in all or any of the lands devised by the will in addition to the provision made for her thereby.

As to the 4th clause of the will: I think the children meant are the children of Charles R. Biggar and his wife Grace Biggar. There were three children living at the date of the death of the testator, and I see nothing either in the words of the gift itself or in the other parts of the will to take the gift out of the general rule, as stated in the second edition of Theobald on Wills, p. 314, that a gift to parent and children is *prima facie* a gift to them concurrently. The same Rule is referred to in Hawkins on Wills, pp. 198-199. Here the gift is to Grace Biggar and

her children, and it goes on to state that she is the wife of Charles R. Biggar and that the children are his children. It is I think the same as a simple gift to her and her children. They take, I think, concurrently, and I am of the opinion that Charles R. Biggar and Grace Biggar are by the words employed made trustees for their children, and that as such trustees (and she as well for herself) they are entitled to receive and can give a good acquittance and discharge for the \$500 mentioned in the clause. But I do not see anything in the will authorizing them to receive or give a good acquittance for the moneys by the 10th clause of the will bequeathed to their children.

As to the 8th clause of the will, it was agreed amongst counsel that I need not endeavour to place a construction upon it so far as it has relation to the lands mentioned in it, these lands being in a foreign country, and there being no evidence of the law of that country. Then as to the moneys mentioned in this clause. The gift is of \$5,500 to Edith Biggar, the wife of George G. Biggar, the bequest to be under the joint management of these two for their heirs, and should there be no heirs then at their death to revert to the heirs of the testator. There were no children of George G. Biggar and Edith Biggar living at the time of the death of the testator. In the case *Ogle v. Corthorn*, 9 Jur. 326, Sir James Wigram said that the language of the will in that case was "very vague," that it was "hardly English." I take leave to think that as much might be said in favour of the will in this case. I am, however, of the opinion that it must be assumed that the testator by the gift of the \$5,500, in the 8th clause, intended a benefit to Edith Biggar the wife of George G. Biggar, and I think it manifest that the words, "their heirs" in the clause can only mean their children, and descendants of such children. Then if there were children they could take only after the death of Edith Biggar, because they are called heirs, if there were no other reason : *Theobald*, 2nd ed. 317. I think the meaning that must be attached to the gift, so far as it relates to the money (and this is all

with which I have at present any concern) is, that there is a trust of this money reposed in George G. Biggar and his wife Edith Biggar, that Edith Biggar is entitled to the benefit of the trust during her life, and that upon her death the benefit of the trust will go to any children there may be of George G. and Edith Biggar, or any descendants there may be answering the description "their heirs" contained in the clause, and if there be no such children or descendants, then to the heirs of the testator to be equally divided amongst them. And I am of the opinion that George G. Biggar and his wife Edith Biggar as such trustees are entitled to receive and can give a good acquittance and discharge for this money.

Then as the ninth clause. This is a gift of \$5,000 to the wife of Miles R. Biggar and his heirs. They cannot take concurrently because there cannot be such heirs during the life of Miles R. Biggar and he is still living. Miles R. Biggar is appointed guardian and manager of the fund. I think that a trust of this fund is reposed in him, and I think the word "heirs" as used in the clause is merely descriptive of legatees intended. Miles R. Biggar is, I think, entitled to receive this fund and hold the same in trust. During his life, there can be no one entitled to the benefit but his wife, and during this period I think she will be entitled to the whole benefit arising from the fund, and upon the death of Miles R. Biggar there will be a distribution of the fund amongst his wife or her representatives, as the case may be, and those persons who will answer the description of heirs of Miles R. Biggar as the word "heirs" is used in this clause. As to the manner of this distribution nothing should be said now. At the proper time the matter can, if necessary, be discussed, when all parties entitled or claiming to be entitled can be heard. I think Miles R. Biggar, as such trustee, is entitled to receive and can give a good acquittance and discharge for this money. But I see nothing authorizing him to give a discharge for any of the moneys mentioned in the tenth clause of the will. No question was raised as to any of the other clauses.

There remains, however, the question as to whether or not the widow is put to her election between her dower and what is given to her by the will. The will does not say that the gifts to her are in lieu of dower, nor does it contain any clause or statement to this effect. The gifts to her are the dwelling house for her natural life, the household goods, and an annuity of three hundred dollars a year secured to her out of the estate. In the case *Murphy v. Murphy*, 25 Gr. p. 83, the late Chief Justice quoting approvingly from Sir John Leach, in *Miall v. Brain*, 4 Mad. 124, says, that "the intention to exclude the wife from dower is not to be implied either from the gift of particular messuages and hereditaments to the wife for her life, or from an annuity provided for her." He also cites the language of Lord Redesdale, in *Birmingham v. Kirwan*, 2 Sch. & Lef. 452, saying, that "an intent to exclude by voluntary gift must be demonstrated either by express words or by clear and manifest implication. If there be anything ambiguous or doubtful, if the Court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported." I have examined all the authorities referred to by counsel on this branch of the case, and scrutinized the contents of the will with some care to see if there is any ground for the implication, and I am of the opinion that the widow is not put to her election, and that she is entitled to what is given her by the will and also to her dower.

The widow has, by her statement of defence, asked that her dower be set apart for her, and for an order for that purpose. No objection was made to this in case it should be held that she was entitled to dower as well as the gifts to her in the will. I am not certain that it was a proper thing to ask in this suit, but as no objection was made to it I think the order may go.

I think the foregoing answers all the questions raised by counsel or by the pleadings.

There will be costs to all parties out of the estate.

A. H. F. L.

[CHANCERY DIVISION.]

BRYSON ET AL. V. THE ONTARIO AND QUEBEC RAILWAY COMPANY ET AL.

Husband and wife—Contract by married woman to convey to railway—Non-joinder of husband—Improvidence—R. S. O. ch. 125, s. 19—35 Vic. ch. 16, O. s. 1—36 Vic. ch. 18, O. s. 3.

Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:
Held, that the Company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully *compos mentis*, and no unfair advantage having been taken of her, the agreement could not be set aside.

B.'s marriage took place in 1876, and the land was held by her to her separate use.

Held, that the concurrence of her husband in the contract was unnecessary, nor was it necessary for him to join in the conveyance.

The real estate of a married woman, married after March 2nd, 1872, whether owned by her at the time of her marriage, or acquired in any manner during her coverture, may be conveyed by her without the concurrence of her husband; and her contracts respecting such real estate are binding upon her without the joinder of her husband.

THIS was an action brought by Mary Bryson and James P. Bryson her husband, against the Ontario and Quebec Railway Company, and McDermid and Hendrie, defendants, claiming that the defendants the railway company might be ordered to arbitrate in respect of a certain right of way and damages under the provisions of the Railway Act in that behalf, and that the defendants might be ordered to pay the plaintiffs such damages as they had suffered by reason of the acts of the defendants; for an injunction restraining the defendants from entering upon and running their trains upon and over the said lands; and for general relief.

The facts of the case fully appear from the judgment.

The action was tried at the sittings of this Division at Peterborough, before Ferguson, J., on April 9th, 1884.

C. Moss, Q. C., and D. W. Dumble, for the plaintiffs. The instrument has no binding effect upon the parties. It is an agreement with a married woman respecting her lands, her

husband not joining in it: *Adams v. Loomis*, 24 Gr. 242; *Sanders v. Malsburg*, 1 O. R. 178; *Ogden v. McArthur*, 36 U. C. R. 246. The husband must be a party grantor in the conveyance; and if a contract cannot be perfected, it is not a contract at all: *McQueen on Husband and Wife*, p. 34; *Dart on Vend. and Purch.*, 4th ed., vol. 2, p. 914; *Castle v. Wilkinson*, 6 Ch. 534; *Avery v. Griffin*, 6 Eq. 606. But the contract is also void because Mrs. Bryson had not the advice of her husband. She was not herself in a position to make an intelligent contract. The evidence shews the transaction was improvident on her part. Neither was there the necessary *consensus* between the parties.

G. T. Blackstock and *A. M. Grier* for the defendants. The contract is binding: *Frazee v. McFarland*, 43 U. C. R. 281; *Kerr v. Strip*, 40 U. C. R. 125; *Lawson v. Laidlaw*, 3 A. R. 77; *O'Doherty v. The Ontario Bank*, 32 C. P. 285; see also the Railway, Act of 1879, 42 Vict. ch. 9, sec. 9, *et seq.*; R. S. O. ch. 125, secs. 4-19; *Furness v. Mitchell*, 3 A. R. 510. The combined effect of these is to fully justify such a contract. There was no fraud or misrepresentation in connection with it. Fraud being charged and not proved we should get our costs in any case.

C. Moss, Q. C., in reply. Save in the legal sense there is no charge of fraud: *Story's Eq. Jur.*, sec. 234; *Burrows v. Leavens*, 29 Gr. 475. The argument founded on the Railway Act of 1879, is fallacious. The Dominion Parliament has no power to change the law of property in Ontario; or alter the law of contract in Ontario. I refer also to *McDonell v. McDonell*, 21 Gr. 342; *Omnium Securities Company v. Richardson*, 20 C. L. J. 49. (a)

June 13th, 1884. FERGUSON, J.—The plaintiff Mary Bryson is the wife of the plaintiff James P. Bryson, and was the owner of certain lands situate within the limits of the corporation of the town of Peterborough, alleged to be of great value and suitable for town lots.

The statement of claim alleges that the defendants

(a) Since reported at length, 7 O. R. 182.

wrongfully broke and entered upon these lands, and dug away the soil and constructed a line of railway across the same, and thereby severed the land into two parts, and committed great damage, in the taking of land for the right of way of the defendants' railway and otherwise, and that the defendants did not make any compensation in respect of the land taken by them or the damages to the plaintiffs occasioned by the construction of the railway, or take any proceedings under the Railway Acts to cause such compensation and damages to be ascertained by arbitration, but refused so to do. And the plaintiffs ask that the defendants be ordered to arbitrate in respect of the right of way and damages under the provisions of the said Acts, or that the defendants be ordered to pay the plaintiffs such damages as were sustained by reason of the alleged acts of the defendants. The plaintiffs also ask an injunction and general relief.

The defendants in their statement of defence say that the plaintiff Mary Bryson, on or about the 8th day of August, 1882, entered into an agreement with the defendants to convey to them so much of the lands in question as might be selected for the purposes of the said railway, and they set forth the alleged agreement, which is as follows :

"Know all men by these presents, that I, Mary Bryson, of the town of Peterborough, in the county of Peterborough, wife of James F. Bryson, bookkeeper, for and in consideration of one dollar of lawful money of Canada to me in hand paid by the Ontario and Quebec Railway Company, the receipt whereof I hereby acknowledge, and the further sum of three hundred dollars per acre to be paid to me on the execution of a conveyance as hereinafter mentioned, do for myself, my heirs, executors, administrators and assigns, covenant and agree to sell, grant and convey to the said The Ontario and Quebec Railway Company, their successors and assigns, so much of my land being in the town of Peterborough, and being part of park lots numbers 7 and 8, in the township lot number 13, in the 12th concession of Monaghan, in the county of Peterborough, as may be selected for the purpose of their railway, and for approaches for said railway across and upon my lands and premises. And to make a good title to the same in fee simple with all dowers barred, and free from incumbrances, to the said The Ontario and Quebec Railway Company. And further, in consideration of the said sum of one dollar to me in hand paid,

I do hereby grant to the said The Ontario and Quebec Railway Company, and those acting for and under them, the right to enter upon my said lands and premises, to lay out and construct the said railway as may be required, and to pass and repass over my lands adjoining those hereby agreed to be sold and conveyed, together with the right to fell and remove any trees standing in any part of the said lot where their said railway passes to the distance of six rods from either side thereof. The price above agreed upon to be in full compensation for land, and all damages of whatsoever nature or kind caused by the taking of lands as above mentioned.

"In witness whereof," &c.

This document bears date August 8th, 1882. It states that it was executed after having first been read over and explained to the plaintiff Mary Bryson. It is executed by her by her mark, and witnessed by C. Stapleton and A. W. Nanton.

The plaintiffs amended their statement of claim, denying the making of this alleged agreement; denying that the plaintiffs or either of them could enter into such an agreement, or that it was binding upon them or either of them if it were entered into; and stating that at the date of the alleged agreement the plaintiff Mary Bryson was, and that she still is, a married woman, living at Peterborough, and that her husband, the other plaintiff, was absent and living in the city of Rochester: that she was then, and for some years previous thereto had been, a confirmed invalid, and had been and was then under medical treatment: that her nervous system was weak and broken, and that she was by reason of her infirmities and weakness, which affected both her body and mind, wholly incompetent to comprehend the nature of the agreement, as the defendants well knew: that she was unable to comprehend the nature of the damages and injury which the construction of the railway would cause to her land; and that while she was thus incapacitated the defendants' agent informed her that whether she signed the agreement, or not the defendants were entitled to and would at once proceed with the construction of the railway: that by reason of this she became excited; and that before she could consult her husband or obtain independent counsel, and

while she was unable to deal with the matter or comprehend her position, the defendants procured her to sign the agreement. The plaintiffs also say that the consideration in the agreement is wholly incommensurate with the injury caused by the construction of the railway across the land ; that the agreement was improvident and was procured by misrepresentation and under circumstances which entitle the plaintiffs to have it delivered up to be cancelled. The plaintiffs also say that as soon as they were advised of the making and nature of the agreement they repudiated it, and forbade the defendants and their contractors from entering upon the lands : that the defendants applied to the Judge of the County Court for an order for immediate possession of the lands : that the application was refused ; and that the defendants thereafter wantonly entered upon the lands and committed the trespass complained of.

The defendants McDermid and Hendrie were simply contractors for the construction of the road, and the defendants the company submit to indemnify them in the event of its being held that the plaintiffs are entitled to recover.

The defendants the company claim by way of cross-relief that there should be specific performance of the agreement, and that the plaintiffs should be ordered to execute a conveyance of the lands.

The quantity of land in the parcel owned by the plaintiff Mary Bryson was, as shewn by the evidence of her husband and co-plaintiff, $8\frac{1}{2}$ acres. The quantity taken by the railway company was $1\frac{7}{10}$ acres, and this lies in a diagonal direction across the larger parcel.

The plaintiffs were married in the year 1876, and the plaintiff Mary Bryson owned the land at the time of the marriage.

It was admitted that the sum of \$321 was tendered by the defendants, the company, before suit. I have, since the trial, been handed an admission that this money was paid into Court under the statement of defence, and that it was taken out by the plaintiffs in the month of October, but

under an order providing that it might be so taken out without prejudice to the plaintiffs' right.

It was contended, on behalf of the plaintiffs, that the money to be paid was so grossly inadequate that this was fatal to the validity of the agreement.

Many witnesses were called, who placed the value of the land added to the damages sustained at a much larger sum than the amount agreed upon. The plaintiff, James P. Bryson, said the land was worth \$325 per acre, and he fixes \$1,500 as the proper sum for the land and the damages. One Duncan McLeod, by the exercise of his judgment and a calculation which seemed a little peculiar, fixed the sum at \$902. Christopher Leary stated his opinion, fixing the sum at \$900 to \$1,000. Another witness, Robert Roe, fixed the amount at about \$800, and he thought the plaintiffs' land worth \$250 per acre. There were also some others called by the plaintiffs as to the alleged inadequacy.

The plaintiffs' witnesses, however, who gave opinions of the value and amount of damages sustained, seemed to me, when cross-examined, to have made extravagant estimates, and I cannot avoid thinking that in the main their opinions as to the damages were fanciful. It may well be, and I am inclined to think the fact is, that the money paid is not a full equivalent for the damages and the lands taken, but I am not at all convinced by the evidence that any such sums as those mentioned by the witnesses should have been paid, and I do not think that if it is assumed that the agreement was in other respects properly and fairly made, the plaintiffs can succeed upon this contention.

I do not think that the evidence shows that Mrs. Bryson was, at the time of making the agreement, a "confirmed invalid," or that her mental faculties were affected by her alleged illness to any appreciable extent, and her demeanor in Court as a witness indicated to me that she is a person possessing a very fair share of sense and shrewdness, and I cannot avoid being of the opinion that this part of the plaintiffs' contentions is without sufficient foundation in fact.

It was contended that the agreement could not stand, because she had no independent advice as to the making of it. I do not perceive how this is to affect it. There was no fiduciary relation between the parties. She was perfectly free to contract or not. The defendants were not in a position to exercise any undue influence over her. Nanton, the agent of the company, who made the purchase, says that he was employed to purchase the right of way through Peterborough: that he had made a purchase from Brown, Mrs. Bryson's father, with whom she was living at the time, at \$200 per acre; that Brown, for this reason, had some knowledge of the manner in which that kind of business was done, and that he told her to consult with him, and she certainly had abundant opportunity of consulting with him. I do not see that any obligation rested upon the company to see that she had any independent advice in the matter, and I think the plaintiffs' contention in this respect fails; and I think the plaintiffs also fail in the contention founded upon the allegation that Mrs. Bryson was hurried or surprised into the making of the agreement. She says that she understood from the agent, Mr. Nanton, that what she signed was only a proposal or offer which her husband was to sanction before it was to have any effect. She says that Nanton was to send it to her husband for his approval. This Nanton positively denies. He says, however, that he did say that it might be necessary for her husband to join in the conveyance of the property, and if so he would (after consulting with the solicitors) send it to him for execution. I think Mrs. Bryson is in error in making this statement. She had a fair opportunity of understanding the agreement. It was, I think, read over and explained to her. She asked to have a part of it read over again, which was done. Her father was present at the time, and although he says that he said nothing, I am inclined to think that those who say he told her she had better sign it are correct; and after considering, as well as I am able, the evidence relating to this part of the case, I am of the

opinion that it has not been shown that unfair advantage was taken of Mrs. Bryson, and I think it appears that she did understand the agreement that she signed, and knew that it was an agreement for the sale of the land at \$300 per acre, which was to include all damages.

It was contended that she did not at the time know that the railway cut her land in a diagonal direction, and could not have understood that the damages were as great as they really were. Mr. Nanton says that she said she should get \$400 an acre for the reason that the land was so cut by the railway "angling" (was the word employed), and I am prepared to believe his statement. It is not shewn that any misrepresentation of any kind was made to her in respect of the transaction, and I think it was fairly made.

It was contended that inasmuch as Mrs. Bryson was a married woman and her husband had not joined in the making of the agreement, it was void. The marriage, as has already been said, took place in the year 1876. The property was, I think, held by Mrs. Bryson for her separate use within the meaning of the first section of 35 Vic. ch. 16, O. The concluding clause of this section is: "And any married woman shall be liable on any contract made by her respecting her real estate as if she was a *feme sole*."

These words are also found in 40 Vic. ch. 7, schedule A, under number 156, 5a., and they constitute section 19 of ch. 125 of the R. S. O. It was contended, however, that the force of this instrument was restricted by the 3rd section of 36 Vic. ch. 18, O., and that the concurrence of the husband was necessary to make any such agreement valid and effectual.

The subject of these two enactments was considered by Mr. Justice Proudfoot in the case of *Boustead v. Whitmore and Wife*, 22 Gr. 222, on the question as to whether or not the husband was a necessary party in a proceeding against a married woman to obtain a conveyance of property vested in her, and afterwards by the learned Judges of the Court of Appeal in *Furness v. Mitchell*, 3 A. R. 510,

on the question as to whether or not the husband was deprived of an estate by the courtesy in any lands of his wife which she had not disposed of *inter vivos* or by will. At page 228 and 229 of *Bousted v. Whitmore*, Mr. Justice Proudfoot said : "She may without the sanction of her husband, and it may be against his will, agree to sell her real estate ; she may determine the price and agree upon the terms of payment, and for these the most material points in which if any protection were required it would have been given ; and if the Legislature deemed her capable of going so far in the disposition of her property, it is not too much to assume that for the merely ministerial act of making a conveyance, they did not mean to encumber her with requiring a needless assent, an inane formality." And further on he says : "I am inclined to go further, and to think that if it were necessary the husband should join, the statute having given her the power to contract, she could apply to the Court to compel him to execute the deed."

In *Furness v. Mitchell*, the late lamented Chief Justice Moss, in speaking of the Acts 35 Vic. cap. 16 and 36 Vic. cap. 18, and particularly of the effect of the latter Act, says at pp. 516 and 517 : "It seems difficult to suppose that the Legislature meant in this indirect mode to destroy the large powers of dealing with their real estate which had been conferred upon married women by the Act of 1872. To require the concurrence of the husband and the execution of the deed by him in order that the estate may be conveyed, would seem to be equivalent to neutralizing, or at least largely impairing, the provision that she shall be liable upon any contract made by her respecting her real estate as if she were a *feme sole*. How, it may be well asked, can the husband be asked to join in the conveyance when he was not a party to the contract ? And if he can be compelled, what is the object in requiring his concurrence ? It may be found that the only solution is to hold that the Act of 1873 only applies to cases where the marriage took place, and the property was acquired before 2nd of March, 1872, and that

where the property was acquired subsequently, a conveyance by the wife alone will suffice. That however is a mode of interpreting the statute which could only be adopted after great consideration, for no such restriction of its operation is to be gathered from its own language. But, (the learned Chief Justice says) it will be time enough to grapple with these difficulties when the question directly arises."

In the same case (*Furness v. Mitchell*) Mr. Justice Burton says, at 3 A. R. p. 523 : "I agree in the general view arrived at by Vice-Chancellor Proudfoot, in *Boustead v. Whitmore*, in construing 36 Vic. whilst differing from him as to the construction placed by him upon sec. 11. * * * By adopting this construction, we give a sensible meaning to both Acts, whilst the other would in effect repeal or render nugatory the legislation of the previous session extending the rights of married women. I come then to the conclusion that the Act of 1873 is a mere amendment of C. S. U. C. ch. 85, and the 34th Vic., and does not and was not intended to affect the Act we are considering."

And Chief Justice Moss, in the same case, p. 514, while speaking of the estate by the courtesy, says : "By according this estate to the husband, in the event of her intestacy, no restraint is imposed upon her power of disposition or alienation. If she chooses to dispose of it by an act *inter vivos*, she cuts off her husband's prospect of holding this estate. If the mode of enjoyment she prefers is to leave it by will, she can thus defeat his hopes. In short, his interest can only arise when her holding has terminated, and she has not chosen to deal with it in any manner."

In this last passage the learned Chief Justice was manifestly speaking of the effect of the Act of 1872, independently of the Act of 1873.

Mr. Justice Morrison concurred with the Chief Justice, whilst Mr. Justice Patterson dissented from the opinions of other members of the Court, delivering a very elaborate and learned judgment.

In the amendment of 1877, 40 Vic. ch. 7, Schedule A. No. 156, are introduced the words, "but nothing

herein contained shall prejudice the rights of the husband as tenant by the courtesy in any real estate of the wife which she has not disposed of *inter vivos*, or by will." This seems to me to affirm the view that the wife may dispose of her real estate without the concurrence of her husband by a conveyance or by will. The point disposed of in *Furness v. Mitchell* was not, nor was the point in *Bousted v. Whitmore* identical with the point I am endeavouring to consider. If it were, I should, of course, have had little, if anything, to say, but simply follow the authority. For the reason that the points are not identical, I have quoted somewhat largely from the parts of the opinions of the learned Judges in which, as it appears to me, they bear upon the matter I have to decide.

I think the indications are plain that some of the learned Judges who have written on the subject have been and are of the opinion that the real estate of a married woman, married after the second day of March, 1872, whether owned by her at the time of her marriage or acquired in any manner during her coverture, may be conveyed by her without the concurrence of her husband, and that her contracts respecting such real estate are binding upon her; and the amendment of 1877, to which I have before alluded, seems to me to be confirmatory of this view; and the conclusion at which I have arrived is that the contract in this case is binding upon the plaintiff Mary Bryson and the estate respecting which it was made. This being so, and looking at the terms of it respecting the entry of the defendants the company upon the lands, and the laying out and constructing the road, and passing and repassing, I do not see how the action can be sustained so far as it is an action of trespass *quare clausum fregit*; and I am also of the opinion that this contract stands an impassible barrier between the plaintiffs and the relief that they ask by way of an order upon the company that they proceed to arbitration under the terms of the Railway Acts; and I think the action must be dismissed, and on the usual terms, with costs.

As to the counter claim, I am of the opinion that the defendants the company are entitled to a specific performance of the agreement, and to an order that the plaintiff Mary Bryson execute a conveyance to them of the lands that they have taken (for the purposes of their road) under the agreement.

A. H. F. L.

[CHANCERY DIVISION.]

GLASS V. BURT ET AL.

Husband and wife—Bond by husband conditioned that executors pay money to wife—Nudum pactum—Law and equity—Incomplete gift—Seal—Implied consideration.

W. G. gave to his wife M. G. a bond conditioned as follows : " That my executors shall pay M. G. \$200 in one year, and \$200 in two years after my decease, and these payments to be made as above stated to M. G., I bind myself to make full provision for in my will to be hereafter made. And should I not make a will, this shall be full authority to my executors to make such payments. When my executors fulfil the above named obligation by making said payments, the above obligation to be null and void, otherwise to remain in full force and virtue."

W. G. died leaving a will, which, however, did not specially mention the above obligation. M. G. alleged that she had left the home of the testator for good cause, and that this bond was given to induce her to return and live with him, which she did, but the learned Judge found otherwise, and that the bond was wholly without consideration in fact. M. G. now sued the executors of W. G. for the \$400 mentioned in the bond.

Held, that M. G. could not recover for that, if the action were considered as an action at law on the bond, the bond was void, since at law husband and wife could not contract ; while if considered as a suit in equity, it was equivalent to a suit for specific performance, or the enforcement of an imperfect gift, and in either case equity would not aid a volunteer, neither did the presence of a seal make any difference.

Held, also, that the bond could not be regarded as a declaration of trust.

THIS was an action brought by Mary Glass against the executors of her late husband, William Glass, to recover certain sums alleged to be due to her out of the estate of the said William Glass, under the circumstances which are fully set out in the judgment.

The action was tried at Brantford, on March 13th, 1884, before Ferguson, J.

Van Norman, Q. C., for the plaintiff. The bond was for good consideration, viz.: the coming back of the wife. The consideration is a good one even if it be doubtful whether the cause of her going away was sufficient to justify her doing so. It is not necessary that any consideration should be shewn in the bond. The bond is operative either as an obligation to make a will, or as an obligation on the executors to pay. Again, it may operate as a declaration of trust, because it authorizes the executors to pay. I refer to *Richards v. Richards*, 2 B. & Ad. 447; *McCormick v. McRae*, 11 U. C. R. 187; *Totten v. Bowen*, 8 A. R. 602; *Tiffany v. Clarke*, 6 Gr. 474.

W. Cassels, Q. C., for the defendants. The plaintiff is a volunteer and can have no relief. The document sued on is bad (1) because there is no consideration: (2) because it is incomplete. *Richards v. Richards*, 2 B. & Ad. 447, has no application. An imperfect gift cannot be treated as a declaration of trust: *Warriner v. Rogers*, 16 Eq., 340; *Richards v. Delbridge*, 18 Eq. 11. See also *Newton v. Sherry*, 1 C. P. D. 246.

June 30th, 1884. FERGUSON, J.—The action is upon a bond in the penal sum of \$500, given by the late William Glass to the plaintiff, who was his wife at the time. The bond bears date January 17th, 1873. The defendants are the executors of the last will and testament of the late William Glass. They duly proved the will.

The condition of the bond is as follows:

"The condition of the above bond or obligation is such that my executors shall pay to the said Mary Glass" (the plaintiff) "the sum of \$200 in one year after my decease and \$200 in two years after my decease, and these payments to be made as above stated to the said Mary Glass, I bind myself to make full provision for in my will to be hereafter made. And should I not make a will this shall be full authority to my executors and administrators to make such payments, when my executors or administrators fulfil the above named obligation by making said payments, the above obligation to be null and void, otherwise to remain in full force and virtue.

William Glass died on the 28th day of December, 1880. The breach alleged is that he made and published his will

whereby he appointed the defendants his executors, but did not in the will specially mention the obligation, and that payment of the moneys and interest was demanded of the defendants the executors, but the same had not been paid.

The alleged will was made, and it was duly proved by the defendants as the executors thereof. It did not contain any special reference to the alleged bond, but did contain a gift to the plaintiff, which will be hereafter referred to.

The statement of claim mentions a deed of about the same date as the alleged bond, and much to the same effect, as having been executed by the late William Glass in the plaintiff's favour, but no such deed was shewn to have existed, and I presume this was only another mode of framing a case upon the alleged bond.

The plaintiff claims from the defendants as such executors the sum of \$400 and interest (this \$400 being the two sums of \$200 mentioned in the bond) the costs of suit, and general relief.

The defendants by the statement of defence say that the plaintiff had, a short time prior to the making of the bond, left and gone away from home, and refused to live with the said William Glass her husband, and refused to reside with him or to return to his residence and live with him; and that he, in order to induce the plaintiff to return to his home and reside with him, and to do and perform the usual avocations as his wife, was induced to make and did make the bond, and they say that there was not any value or consideration for the making of the same. They also say that the late William Glass did make his will, whereby he devised to the plaintiff the yearly rent of two frame houses in the village of St. George in the county of Brant, and that after the death of the said William Glass, the plaintiff went into the possession of the said houses, and has accepted and taken the rents of the same ever since. They also say that they duly advertised for debts, accounts and claims against the estate, and no claim having been

sent or rendered by the plaintiff within the time specified in such notice, although the plaintiff was duly notified according to law, they fully administered all the personal estate and effects that were of the said William Glass that came into their hands, and that they had not at the commencement of the suit, nor have they now, any personal estate of the said William Glass in their hands, &c.

The bond sued on contains no statement of a consideration. It makes no reference to any consideration. What the plaintiff sought to show was, that for good cause she had left the home of the testator her then husband, and that the bond was given her to induce her to return and live with him, and that she did so return and lived with him. Evidence was given at some length for the purpose of establishing that there was good and sufficient cause for the plaintiff's conduct in leaving the home of her husband at the time she left it, and in support of the contrary contention; and on the evidence I have no hesitation in finding and I am clearly of the opinion that there was not any good or sufficient cause for her so leaving the home of her then husband William Glass, and I am of the opinion and I find that the bond was wholly without consideration in fact.

I also find that the testator did by his will leave to the plaintiff the rents of the two houses as in the statement of defence alleged, and that she took possession of the same as there alleged. I also find that the defendants did advertise for claims against the estate, requesting all claimants to send on or before the first day of March, 1881, to the defendant Mullen, one of the executors, by letter prepaid to St. George Post Office, their claims and full particulars thereof, and stating that on and after that day the estate would be distributed, having regard to the claims only of which due notice should have been received. The notice seems to have been much after the form of notice used by the Court in cases of administration, &c. The notice was inserted in the Brantford *Expositor* and St. George *Leader*.

It is not proved that any claim was made upon the bond

in question till the 8th of February, 1882, when a letter was written by the plaintiff's solicitor to Mr. Mullen, one of the defendants. Mullen in his examination, however, says that he saw "the paper now set up" (the bond) at the time the defendants were applying for probate; that it was not shewn to him by the plaintiff, and that he did not know that she was making any claim upon it.

As to the want of consideration in fact for the making of the bond sued on, it may be said that it is under seal and a consideration is at law imported by the seal. In the case *Kekewich v. Manning*, 1 DeG. M. & G. at p. 187-8, Lord Justice Knight Bruce, speaking of gifts, says: "Generally this question when arising here is very material, for as upon one hand it is on legal and equitable principles, we apprehend, clear that a person *sui juris* acting freely, fairly, and with sufficient knowledge, ought to have and has it in his power to make in a binding and effectual manner a voluntary gift of any part of his property, whether capable or incapable of manual delivery * * so, on the other, it is as clear generally, if not universally, that a gratuitously expressed intention, a promise merely voluntary, or to use a familiar phrase *nudum pactum*, does not (the matter resting there) bind legally or equitably. I have been speaking of transactions without any sealed writing. But though it is true that in cases where such an intention, such a promise, is expressed in a deed, it may bind generally at law as a covenant, by reason of the light in which the particular kind of instrument called a deed is regarded at law, yet in equity, where at least the covenantor is living, or where specific performance of such a covenant is sought, it stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed." In the case *Dennison v. Goehring*, 7 Barr.(Penn.), at p. 178, Gibson, C. J., speaking in respect of the creation and enforcing of Trusts, said: "The reason of the difference with regard to the effect of a seal is, that the interposition of the Chancellor is matter of favour; but that the interposition of a Court of law, with whom the seal stands for a consideration, is matter of right."

In *Redman* on the Law of Husband and Wife, at p. 63, it is said: "A man cannot contract with himself or make an assurance to himself of that which he already has, and on the ground of the unity of person of husband and wife there was at common law an absolute incapacity in the husband and wife after marriage to contract with each other or make transfers of property directly to each other. * * Equity, however, recognized the power of a wife to contract with her husband without the intervention of a trustee, not only in respect of her separate estate but in respect of all matters in which for the purposes of the contract she may be regarded as a *feme sole*, and accordingly upheld an agreement by a wife to compromise a divorce suit which she had instituted, and an agreement by a wife to live apart from her husband."

In each of these cases there is a good consideration, as will be seen by a perusal of sections 1534 and 1535 of *Fry* on Specific Performance (2nd ed.).

In any such case there must be a good contract—one supported by a consideration. In the present case there is in my opinion, as I have already stated, no consideration in fact.

If this suit is considered to be an action at law upon the bond alleged in the statement of claim, I think it should be held that at law the bond is void, because at law the husband and wife were incapable of contracting. If the plaintiff call it a suit in equity it should, I think, then be assigned the position of a suit for specific performance of a promise, or for the enforcing of an imperfect gift—a promise to give—and the plaintiff will be met with the assertion that in either case equity will not aid a volunteer; that there was no consideration; and the use of the seal can in either such case make no difference. If it should be attempted to support the document as a declaration of trust as was intimated (though but very slightly) at the trial, the language of Sir George Jessel, in *Richards v. Delbridge*, 18 Eq. at p. 15, and the case *Warriner v. Rogers*, 16 Eq. 340, referred to by Mr. Cassels on the argument, afford, I think, a sufficient answer.

Being, for the reasons I have endeavoured to state, of the opinion that the plaintiff cannot succeed, I do not think I am called upon to deal with the additional defences set up by the defendants. I think the action should be dismissed, and I perceive no good reason for withholding costs.

The action is dismissed, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

MENNIE V. LEITCH.

Agreement to advance money—Construction—Breach—Measure of damages.

Defendant agreed to furnish plaintiff with money to construct a drain in the township of Dunwich, known as the Mennie drain the amount to be furnished "not to exceed the sum of \$1,500 at any time," and to pay the sum to plaintiff as often and in such sums as might be required, the plaintiff to give the defendant his note for each sum required, and to pay defendant interest at 12 per cent per annum for the use of said moneys.

Plaintiff alleged that upon the strength of this agreement he contracted with the township to construct the drain. Defendant furnished moneys from time to time to the plaintiff, exceeding in all \$1,500, but not sufficient to complete the drain, and defendant refused to furnish more. The plaintiff borrowed moneys from others at less than 12 per cent interest, but claimed damages for alleged breach of his agreement, contending that he was thereby delayed in completing the drain, and that owing to such delay and to the winter setting in he lost largely, instead of making a profit, which he would otherwise have made.

Held, that whether the agreement was to furnish money to the extent of \$1,500 only, or to such extent as might be necessary for the construction of the drain, not exceeding \$1,500 at any one time, the only damages for which defendant was liable would be the difference between the rate of interest payable to defendant under the agreement and the market rate of interest at the time of the breach.

Per ARMOUR, J.—Under the true construction of the agreement the defendant was bound to supply \$1,500 only.

ACTION brought by the plaintiff for the breach by the defendant of the following agreement:

"Agreement made and entered into the eighteenth day of September, 1882, between A. G. Leitch, of the village of Dulton, postmaster, of the one part, and John Mennie, of the township of Dunwich, contractor, of the other part. Witnesseth, that the said A. G. Leitch hath agreed to furnish money to the said John Mennie for the construction of the Mennie drain, not to exceed the sum of one thousand five hundred dollars (\$1500) at any time, and to pay the same to the said John Mennie as

often and in such sums as he may require. And the said John Mennie hath agreed to give the said A. G. Leitch his note of hand for each and every sum of money requisite to make up the amount above mentioned, and to pay to the said A. G. Leitch interest at twelve per cent. per annum for the use of said moneys. Said notes to be used by the said A. G. Leitch only as collateral security and not for any other purpose. And the said John Mennie hath agreed to procure an estimate of work done on each section of said drain as soon as such section is completed, and assign such estimate to the said A. G. Leitch, the proceeds of which are to be applied to the payment of notes given to said Leitch, and interest on same.

Witness our hands this eighteenth day of December, 1882.

In presence of (Signed) "A. G. LEITCH."
(Signed) A. W. PATERSON. (Signed) "JOHN MENNIE."

The plaintiff in the second paragraph of his statement of claim alleged the legal effect of this agreement, that the defendant would furnish the plaintiff money for the construction of the said Mennie drain, but so that the money so to be advanced should not exceed the sum of \$1,500 at any one time.

In the third paragraph of his statement of claim the plaintiff alleged performance of all things by him to be performed by the said agreement; and in the fourth paragraph thereof he alleged as a breach thereof by the defendant, that he wrongfully refused to fulfil said agreement and refused to advance the moneys necessary for the construction of said drain, whereby the plaintiff was delayed and hindered in the construction thereof, and put to a large amount of costs and expenses, and suffered loss and damage in consequence of the defendant's refusal to advance said moneys according to said agreement.

The defendant set up that he was induced to enter into the said agreement by the fraudulent representations of the plaintiff: that the plaintiff falsely represented to him that besides being indebted to certain mortgagees of his farm he was not indebted to any other person, whereas in truth he was insolvent; and that but for such representation defendant would not have entered into the said agreement: that he made advances from time to time to the plaintiff till he discovered the falsity of the representation, and that when he did so he avoided the agreement: that the plaintiff, although requested to do so by the defendant, refused to assign the estimates to the defendant as pro-

vided by the said agreement, and wrongfully appropriated the same and the moneys payable thereunder to his own use, whereupon the defendant refused to make further advances : that the plaintiff wrongfully applied the moneys advanced to him by the defendant to other purposes than the construction of the said drain, and if he was delayed and hindered, and was put to a larger amount of costs and expenses, and suffered loss and damage, it was because he did not use all the said advances for the construction of the said drain ; and that the plaintiff's claim did not shew a good cause of action.

Issue.

The cause was tried at the last Fall Assizes, at St. Thomas, by Wilson, C. J., and a jury.

The plaintiff swore that he entered into the contract for the construction of the Mennie drain on the faith of the defendant's promise to advance him the money, and that he could not have done so without such advance, and that the defendant knew it : that the contract amounted to 26,000 cubic yards, at 13½ cents per yard, or \$3,652 : that the defendant made advances to him up to the 12th of June, 1883, and on the 16th of June he informed him that he was unable to give him any more money : that the defendant made such advances to him up to the 14th of July, amounting to \$2,040, and in addition joined him in two notes as surety for \$500 more : that the defendant received from estimates, up to that time, \$1,420 : that he several times applied to the defendant for further advances, and that the defendant did not say that he would not, but that he could not make them : that by reason of the defendant's failure to advance further moneys he was obliged to discharge his men on the 14th of July, and was unable to complete the drain that Fall, as he otherwise would have done ; and that instead of making \$500 or \$600 profit on the contract, he stood to lose about \$800 on it : that he and the defendant had a settlement in October of the same year of their mutual accounts, upon which a balance was found in favour of the defendant of

\$651, of which he then paid \$300 by procuring a mortgage to be made to the defendant for that amount by one Allen, and \$300 by giving to the defendant his note with a surety for that amount: that in the following February he made an arrangement with the defendant securing to him the balance, and by which he assigned all his real and personal property to the defendant, the defendant agreeing in consideration thereof, and of \$300 to be paid to him, to pay off creditors of the plaintiff to the amount of \$6,922.68: that neither at the settlement in October, nor at the time of the arrangement in February, nor at any other time either before or after, until the commencement of this suit in the following July, did he complain to the defendant of or make any claim upon him for damages for the alleged breach by him of his contract, and the thought of damages first dawned upon his mind about the 1st of July, 1884. The defendant swore that the plaintiff had several times promised to give him up the agreement sued on, but this the plaintiff denied.

The learned Chief Justice left it to the jury to say whether the defendant had broken his contract by not making the advances, and whether the parties gave up the contract and rescinded it by the settlement of October, 1883. The jury found in favour of the plaintiff, and \$600-damages.

On the 19th of November *Holman* obtained an order nisi to set aside the judgment and enter a nonsuit; or to dismiss the action, with costs; or for a new trial, or to enter judgment for the defendant, upon the following grounds:

1. The plaintiff did not shew any demand of any specific sum.
2. The plaintiff did not shew any refusal on the part of the defendant which worked a breach of the agreement, and the breach of the agreement, if any, was on the part of the plaintiff in refusing to assign over the estimate in July. The evidence of the plaintiff shewed that after the

alleged refusal in June the defendant advanced the amount of the two promissory notes.

3. The agreement of the plaintiff with the corporation was to complete the work by the 1st of January, 1883, and the defendant was not bound to have on hand and keep ready for the plaintiff the moneys mentioned in the agreement after the time had expired for the completion of the work, or for an indefinite time.

4. There was no consideration for the agreement sued upon, and the plaintiff was not bound thereby to receive the moneys, and the defendant was not bound to fulfil the same.

5. Subsequent to the alleged breach an agreement was made between the plaintiff and defendant settling the matter in dispute, and the plaintiff was thereby debarred from asserting the claim sued for.

6. No damage resulted to the plaintiff by the alleged breach.

7. The damages were excessive.

8. The verdict was contrary to evidence, and the weight of evidence, and to the Judge's charge, and against the law and evidence.

9. The verdict and judgment ought, under all the circumstances, to have been given for the defendant.

Cassels, Q.C., *Glenn*, with him, supported the order *nisi*. The defendant's agreement is only to find money for plaintiff to enable him to carry on the work, and the only claim in law which can be sustained against the defendant is not for general damages, but only for any higher interest the plaintiff may have had to pay by reason of defendant's breach of contract. See *Hyde v. Gooderham*, 6 C. P. 21; *Roberts v. v. Brett*, 11 H. L. 337, S. C., 18 C. B. 561, 6 C. B. N. S. 611.

Meredith, Q.C., contra, contended (1) that where a special contract for the advance of money is made the ordinary rule does not apply, that the damages are confined to interest on the money, but that the person suing for default

in making the advance is entitled to substantial damages, which are to be limited to those naturally resulting from the breach of contract, and which might reasonably be supposed to be in the contemplation of the parties ; (2) that the defendant was in the position of a banker of the defendant, and to be treated as a banker dishonouring his customer's check, and so liable to substantial damages.

March 7, 1885. ARMOUR, J.—I am of opinion that according to the true construction of the agreement sued on, the plaintiff must fail in this action.

The evidence shewed that the defendant furnished more than \$1,500 to the plaintiff for the construction of the Mennie drain, and having done so, he, I think, performed his agreement. The defendant did not agree to furnish the money or the money required, but only "money to the plaintiff for the construction of the Mennie drain." The amount of money to be furnished by him is left by the agreement altogether indefinite, but it is "not to exceed the sum of one thousand five hundred dollars (\$1,500) at any time, and" he is to "pay the same" (that is, the money) "to the said John Mennie as often," (that is, at such times) "and in such sums as he may require."

I do not think we would be justified in holding the legal effect of the words "at any time" to be at any one time, as claimed by the plaintiff in his statement, for we would thus be giving an effect to these words beyond their plain meaning.

The words "the same" plainly refer to the word "money," and the words "as often" are equivalent to "at such times."

The agreement by the plaintiff "to give the said A. G. Leitch his note of hand for each and every sum of money required to make up the amount above mentioned," strengthens this construction, the words "amount above mentioned" clearly referring to the sum of \$1500 beyond which the defendant was not bound to furnish money to the plaintiff at any time.

There is nothing in the residue of the agreement repugnant to this construction, nor anything in the agreement anywhere to shew that the words I have construed should be construed otherwise than according to their plain grammatical meaning, which meaning I have placed upon them.

It may be that the construction put upon the agreement by the plaintiff in his statement of claim is what the parties intended to express, but they have not expressed it, and we are only at liberty to deduce their intention from what they have expressed.

Assuming, however, the legal effect of the agreement to be as claimed by the plaintiff in his statement, the plaintiff did not, in my opinion, establish any damages such as might fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from the breach by the defendant of his contract, or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Nor was anything shewn, in my opinion, to take this case out of the general rule applicable to the case of non-payment of money. "No matter what the amount of inconvenience," says Willes, J., in *Fletcher v. Tayleur*, 17 C. B. 21, "sustained by the plaintiff, in the case of nonpayment of money, the measure of damages is the interest of the money only."

It is true that the money to be lent by the defendant to the plaintiff was for a known and specified purpose; but even so, the measure of damages could not be greater than the additional sum he was obliged to pay for the use of the money beyond what he was to have paid the defendant for it, and could not, in my view, be greater than the market value of the use of money at the time of the breach.

This is the case of the breach of an agreement to lend money for a known and specified object for interest payable therefor, and is no stronger a case for damages than the case where a person breaks his agreement to pay for

work done for him, or for work being done as the work progresses, any number of which cases arise every day, as, for instance, in building contracts, and no case has been cited in which greater damages have been held recoverable for such a breach than the money payable and interest.

The plaintiff's counsel tried to maintain that the defendant was in the position of the plaintiff's banker, or in the position of a person having funds or property of the plaintiff in his hands with, or out of the proceeds of which he had agreed to meet liabilities of the plaintiff; but the defendant was not in this position at all, for he had no funds or property of the plaintiff in his hands. The cases, therefore, of *Marzetti v. Williams*, 1 B. & Ad. 415; *Rolin Steward*, 14 C. B. 595; *Prehn et al. v. The Royal Bank of Liverpool*, L. R. 5 Ex. 92; *Boyd v. Fitt*, 14 Ir. C. L. Rep. 43; *Larios v. Gurety*, L. R. 5 P. C. 346, and *Hyde v. Goodeham*, 6 C. P. 21, are distinguishable upon this ground.

I refer also to the judgment of Willes, J., in *British Columbia Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499; *Duckworth v. Ewart*, 2 H. & C. 129; *McCollum v. Davis*, 8 U. C. R. 150; *Haynes v. Smith*, 11 U. C. R. 57; *Blood v. Wilkins*, 43 Iowa, 562.

In my opinion the action should be dismissed, with costs.

WILSON, C. J.—The consideration for the contract between the parties was really this. In consideration that the plaintiff will take the contract from the township of Dunwich, for the construction of the Mennie drain, and requires money for the carrying on of such work, and will pay the defendant twelve per cent. interest for such money, the defendant will furnish the plaintiff with money for the purpose, not to exceed \$1,500 at any time, and in such sums as he requires, and the plaintiff will give his notes to the defendant for such advances, which the defendant may use as collateral security.

That consideration is not stated in the agreement, and it is not under seal.

The agreement is, that Leitch will furnish money to the plaintiff for the construction of the drain, not to exceed \$1,500 at any time, and pay the same to Mennie as often and in such sums as he may require ; and Mennie agrees to give Leitch his note for each sum requisite to make up the amount above mentioned, and to pay Leitch interest at twelve per cent. for the use of the money.

The consideration then shortly stated between the parties is this. In consideration of the defendant advancing money as aforesaid to the plaintiff, (which he agrees to do) the plaintiff agrees to pay interest at twelve per cent. and will give his note for the moneys advanced to the defendant. That is a good consideration.

The next question is, is this an agreement to advance \$1,500 only, or to advance from time to time money for the construction of the drain, the cost of which exceeded more than double that amount, but not more than \$1,500 at any one time, the words of the agreement being "not to exceed \$1,500 at any time?"

In *Bovill v. Turner*, 2 Chitty R. 205, the agreement was : "You may let Lang have coals to £50, for which I will be answerable at any time." Held, a guarantee only for £50, and not a continuing guarantee.

In *Heffield v. Meadows*, L. R. 4 C. P. 595, a guarantee was given : "£50. I, John Meadows, of, &c., will be answerable for £50 sterling, that William Yorke, of, &c., may buy of Mr. John Heffield, of, &c." Held, on looking at the surrounding circumstances, it was a continuing guarantee.

The words of an instrument are to be taken most strongly against the party using them.

In *Mayer v. Isaac*, 6 M. & W. 605 : "In consideration of your supplying my nephew with china and earthenware I guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200" was held a continuing guarantee.

So a writing to be answerable for the supply of *any* goods : *Bastow v. Bennett*, 3 Camp. 220 ; *Mason v. Pritchard*, 12 East 227.

In *Merle v. Wells*, 2 Camp. 413, Lord Ellenborough said: "If a party means to be surety only for a single dealing he should take care to say so."

The case of *Hobson v. Bass*, L. R. 6 Ch. 792, may also be cited.

The surrounding circumstances plainly show this was to be a continuing guarantee.

The remaining question is, whether the plaintiff, assuming the defendant refused to advance money as he had agreed to do, is answerable for any greater damages than any higher interest he was obliged to pay to others for raising the required money by reason of the alleged default of the money. I think that is the limit: *Prehn v. The Royal Bank of Liverpool*, L. R. 5 Ex. 92.

In this case the plaintiff procured as much money as he wanted from others at a lower rate of interest than he was paying to the plaintiff; so he sustained no damage. It was his own fault that he was thrown over the winter, and lost money by the job.

If my opinion were different I should be in favour of granting a new trial and striking out the jury notice, because the verdict is directly against the evidence, as all matters were settled between the parties before the bringing of the action, and the finding of the jury, that this transaction was not included in the settlement, was what may properly be called a perverse finding.

O'CONNOR, J., concurred.

Action dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. HALL.

Medical Act, R. S. O. ch. 142—Practising without registration—Conviction—Unauthorized adjournment.

The defendant, who was agent for a dealer in musical instruments, undertook to cure one P. of cancer by friction and application of a certain oil, receiving as remuneration \$3 a visit, which he stated was for the medicine, being its actual cost. He admitted having practised in Germany, and that he imported the specific in question by the gross. It also appeared that he prescribed other medicine for the patient besides the oil. *Held*, that this was practising medicine, and that the defendant was rightly convicted of doing so for gain or hope of reward without registration under the Medical Act. The magistrate, on the 12th of November adjourned the case, by consent, for one week, for judgment, and against the protest of defendant's counsel, changed the day, and gave judgment on the 18th. *Held* that the conviction must be quashed.

February 10, 1885. This was a motion by *Murphy* for an order *nisi* to quash a conviction for unlawfully, for gain and hope of reward, practising medicine without registration under the Medical Act, R. S. O. ch. 142. The conviction was had before the Police Magistrate at London.

The evidence shewed that the defendant undertook to cure a Mrs. Prodger of cancer. His treatment consisted of friction and irritation of the surface of the body and application of a certain oil by rubbing it on the parts of the body previously subjected to the friction. For this he received \$3 a visit. He stated that this was for the medicine, being its exact cost, and that he did what he did without gain or reward, or hope thereof. His language was, "I practise entirely from charity to suffering humanity. I do not expect to get a cent for what I do."

He admitted having practised in Germany, and having imported this oil by the gross at a cost of \$54 per dozen bottles. He said that one bottle would do for an application and a half.

He apparently was not a man of means, describing himself as agent for a dealer in musical instruments.

Clements shewed cause.

Murphy and *R. M. Meredith*, contra.

March 13, 1885. Rose, J.—The Police Magistrate found the defendant guilty, evidently believing that he did make gain by what he did. I am not disposed to quarrel with that finding.

The decision also includes the finding that he practised. He so states in so many words, and the fact that he imported the oil by the gross is a fact which prevents my saying that the magistrate had no evidence of practising.

It is not necessary that his living should come from this source solely. It is a question of fact. No particular number of cases is necessary: *Woodward v. Ball*, 6 C. & P. 577. In one case one act of a solicitor was held not evidence of practising: *In re Horton*, 8 Q. B. D. 434.

The conclusion of fact from the evidence to which my mind is brought is the same as that which led the magistrate to adjudge defendant guilty.

I think this was practising medicine. In addition to applying the oil the defendant prescribed and ordered aperient medicine. What exactly practising medicine may mean I do not undertake to define. I think, however, this is a case of practising medicine.

An objection was taken that an adjournment was made during the hearing for four weeks. Sec. 46, of 32-33 Vic. ch. 31, says no adjournment shall be for more than one week.

I find on the return to the writ a memorandum of the following adjournments:

"30th July, 1884—Enlarged to 8th August, 1884. 8th August, 1884—Enlarged to 15th August, 1884. 15th August, 1884—Enlarged for four weeks. 12th September, 1884—Closed and stands for judgment. 12th November, 1884—Enlarged by consent for one week, on application of defendant, for judgment. 18th November, 1884—Guilty—\$25 and costs, notice of the change of day having been first given to the defendant's counsel.

"E. JONES PARKE, P. M."

I find also a letter from the Police Magistrate to the clerk of the Police Court, dated 12th November, 1884,

directing him to "notify E. Meredith, Esq., (defendant's counsel) that the case against Hall is adjourned until the 18th instant, on which day judgment will be given;" also, on the same day, an affidavit made by Mr. Morehead, one of defendant's solicitors, stating that defendant was out of town, and was not expected back for a week or ten days; that he was then travelling about the country as an agent for the sale of pianos, and that it was impossible to communicate with him until his return to the city, and that it was necessary he should be present when judgment was given, as, in case of an adverse judgment, he was desirous of appealing to the Court of General Sessions.

I suppose that this last clause had reference to the necessity of giving notice of appeal within four days after conviction.

I have no explanation on the papers as to why nothing was done between the 12th September and 12th November. The case does not seem to have been enlarged on the 12th of September. From the note of the application by defendant's counsel, on the 12th of November, for a week's further enlargement, and that such enlargement was by consent, possibly the objection to the two months' enlargement was waived.

The shortening of the time, from the 19th of November to the 18th, was not done with the defendant's consent, but against protest by his counsel, and any objection thereto has not been waived.

I observe that the conviction requires payment of the fine and costs within four days from the date of the conviction, *i. e.*, the 18th November; in default, distress; and in default of distress, imprisonment at hard labour for ten days.

By reference to *Harris* on Criminal Law, pp. 361-2, 433-4, and cases there cited, it will be seen that generally it is necessary to have the prisoner present during the trial, and to receive sentence. By statute it is permitted, in certain cases, for the trial to proceed in prisoner's absence.

By sec. 46, above referred to, power to adjourn the hearing is given "to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective attorneys or agents then present; and in the meantime the justice or justices may suffer the defendant to go at large, or may commit (D) him to the common gaol, or other prison, within the territorial division for which the justice or justices are then acting, or to such other safe custody as the justice or justices think fit; or may discharge the defendant upon his recognizance (E) with or without sureties, at the discretion of the justice or justices, conditioned for his appearance at such time and place to which such hearing or further hearing is adjourned; but no such adjournment shall be for more than one week."

By sec. 47, if either complainant or defendant do not appear, power is given to proceed with the hearing.

By sec. 41 the sentence or conviction is to follow the giving of the evidence.

In *Paley on Convictions* we find "conviction" indexed under the word "hearing." No authority has been cited, and I have found none, enabling a magistrate, after adjourning to a time and place certain, to change such time or place without the knowledge of the defendant, and, as here, in face of the protest by his counsel, and after being informed on affidavit that the defendant could not be communicated with.

In the absence of authority I think the practice too questionable to be sanctioned. In some cases such action might result in great injustice. I do not know that the defendant was prejudiced in this case.

The order must be to quash the conviction. Had I been with the defendant on the merits, this is a case in which I could have ordered costs, but as he escapes by reason of an objection to the procedure, for which the complainant is not responsible, I think I should not award costs.

Conviction quashed.

[CHANCERY DIVISION.]

YOST ET AL. V. ADAMS ET AL.

Will—Direction to pay debts—Executors' power to sell lands not devised—R. S. O. c. 109, sec. 19.

A testator by his will directed his executors to pay his debts, etc., and then proceeded: "The residue of my estate and property which shall not be required for the payment of debts, I give and devise and dispose of as follows." Certain lands were not mentioned.

Held, that, nevertheless, the executors could give a good title to them to a purchaser, for the above words clearly imported an intention that the debts should be paid first out of the estate and property of the testator; this created a charge of the debts upon his lands, and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there was an intestacy as to the part in question in this action, did not detract from the conclusion that all the lands were so charged. The direction that his debts should be paid by his executors, conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds.

Held, also, that apart from the above, R. S. O. ch. 107, sec. 19, covered the case. The testator had not indeed, within the meaning of that section, devised the real estate charged in such terms as that his whole estate and interest therein had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon, which the Act in effect transmutes into a trust, and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator.

ACTION for specific performance of a contract for the sale of certain lands made by the defendant, William Case Adams, and one H. P. Adams, as executors of the Reverend Ezra Adams deceased, with A. Z. Gottwalls, who had, before action brought, assigned his rights under it to the plaintiffs.

It appeared that the Reverend Ezra Adams died on December 1st, 1871, seized in fee of the lands in question, and by agreement dated March 15th, 1879, the defendant and H. P. Adams, as his executors, agreed to give a good and sufficient deed to A. Z. Gottwalls, of the lands in fee simple, with the usual covenants, for the price therein mentioned. Gottwalls entered into possession under this agreement, and on May 1st, 1882, assigned his rights under it to the plaintiffs absolutely. H. P. Adams died in 1881. On March 16th, 1883, the defendant executed a deed of the land in question to the plaintiffs, who, however, on afterwards searching the title, became doubtful whether

the defendant had authority to execute such deed, and whether the Reverend Ezra Adams, by his will, did give to his executors any power or authority to convey these lands, which, it appeared, were not disposed of by or included in the said will. They therefore, on April 22nd, 1884, commenced this action, claiming specific performance of the agreement, or else repayment of such portions of the purchase money as had been paid by them, and further relief (a).

The terms of the will of the Reverend Ezra Adams sufficiently appear from the judgment of Boyd, C.

On June 5th, 1884, judgment was given ordering specific performance of the agreement in case a good title could be made, referring it to the Master at Walkerton to report whether a good title could be made, and reserving further directions and costs.

On October 20th, 1884, the Master made his report that a good title could not be made.

On November 19th, 1884, the defendant moved by way of appeal from the said report, on the ground that a good title could be made.

C. Moss, Q. C., and *W. Barwick*, for the defendant. There is no doubt a sufficient direction in the will to charge the debts on the land : *Greville v. Browne*, 7 H. L. C. 689; R. S. O. ch. 107, secs. 17, 19. 20. The executor can clearly make a good title to the purchasers : *Robinson v. Lowater*, 17 Beav. 592, in App. 5 DeG. M. & G. 272; *Wrigley v. Sykes*, 21 Beav. 337; *Re Clay v. Tetley*, 16 Ch. D. 3; *Corser v. Cartwright*, L. R. 7 H. L. 731.

H. J. Scott, Q. C., and *D. Robertson* for the plaintiffs. There is a distinction between this case and those cited by the defendant. Here there is an intestacy so far as the land in question is concerned. The intention of the statute referred to was to settle whether the estate taken under the will was legal or equitable, and to exempt purchasers from inquiry. See *In re Bailey—Bailey v. Bailey*, 12 Ch.

(a) Other questions arose in the case which it is not necessary further to mention here.

D. 272; *Davies to Jones and Evans*, 24 Ch. D. 190. It is a strong point that no English or Canadian case appears to have gone beyond the very words of the statute. Can it be said that the will shews a clear intention to charge this land as against the other lands which are specifically devised? Those lands might be sold, but this cannot. The heirs do not take under the will, and should not be affected by it: *Re Cameron*, 26 Ch. D. 19.

November 26th, 1884. BOYD, C.—The will in question directs the executors to pay the debts, &c., of the testator, and then proceeds, "the residue of my estate and property which shall not be required for the payment of debts I give, devise, and dispose of as follows." This clearly imports an intention that the debts are to be paid first out of his estate and property, and then the residue is disposed of. This creates a charge of the debts upon his lands, and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there is an intestacy as to the part in question, will not detract from the conclusion that all the lands are so charged. In this respect the will is like that in question in *Doe v. Hughes*, 6 Ex. 223, but it is unlike in this regard, that here the testator directs his debts to be paid by his executors, by which an implied power of sale is conferred upon them. There is not merely a general charge of debts on all the lands, but an implied direction to the executors to make that payment out of the proceeds of his land to be realized for that purpose: *Robinson v. Lowater*, 17 Beav. 592, and 5 DeG. M. & G. 272.

The language of Turner, L. J., in *Robinson v. Lowater*, 5 DeG. M. & G., at p. 277, is pointedly applicable to the language of this will where he says: "It seems to me therefore, upon the whole scope of this will, without reference to the cases decided upon the subject, that in this case, at least, it was the intention of the testator that the money should be raised by the executors; and if by the executors, then the executors must be considered as invested with all the powers necessary to raise it."

Upon the effect of a direction to the executor to pay debts, and then a devise of the residue of his estate as operating to charge the debts upon the land, I refer to *Darling v. Hudson*, 17 Beav. 248; *In re Brooke—Brooke v. Brooke*, 3 Ch. D. 630; *Greville v. Brown*, 7 H. L. Cas. 689; *Hawkins on Wills*, p. 286; *Withers v. Kennedy*, 2 M. K. 607; *Mirehouse v. Scaife*, 2 M. & Cr. 695.

There being a charge created by the first part of the will on all the estate, the omission of the testator to include in the residue the land now in question, does not indicate any change of intention as to the land so omitted. It descends so charged to his heirs: *Graves v. Graves*, 8 Sim. at p. 56, and *Shallcross v. Finden*, 3 Ves. 737. It is tantamount to saying: "I will that my debts shall be paid by my executor out of my estate," in which case, though there should be nothing else in the will, the estate would descend to the heirs at law charged with the debts, and an implied power would be possessed by the executor to sell the land for the purpose of paying the debts.

In *Gosling v. Carter*, 1 Coll. C. C. 644, Knight Bruce, V. C., held that in order to the exercise of the implied power to sell to pay debts, it must be proved that the testator died indebted. This being proved, he thought that it was a question merely of conveyancing as to whether the sale should be completed without the heir joining in the conveyance. He said: "In my judgment, he, the heir, is bound to give that concurrence, if necessary, upon the requisition of the executors and the purchaser," p. 651. This was decided in 1845.

In 1852 Lord St. Leonards decided *Stronghill v. Anstey*, 1 DeG. M. & G. 635, and at p. 653, he is thus reported: "When a testator by his will charges his estate with debts and legacies, he shews that he means to intrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for them. It is by implication a declaration by the testator that he intends to intrust the trustees with the receipt and application of the money, and not to throw any obligation

at all upon the purchaser or mortgagee. That intention does not cease because there are no debts; it remains just as much if there are no debts as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a declaration of the testator that he means, and the nature of the trust shews that he means, that the trustees are alone to receive the money and apply it." The view of Lord St. Leonards may perhaps be restricted to cases where the executor or trustee selling has the legal estate, and the view of Knight Bruce, V. C., to cases where the legal estate is outstanding in others whose concurrence may be required to the conveyance. When the purchaser gets a conveyance of the legal estate he is protected whether there are debts or not, unless he has knowledge that there are no such debts: *Re Tanqueray*, 20 Ch. D. at p. 477. But assuming that any such proof was necessary, the evidence before the Master is sufficient to shew that there were debts of the testator in existence when the contract of sale was made. The result of the evidence appears to be, that there was not sufficient personal property to pay the debts; that the two executors advanced about four hundred dollars to pay the debts, and to repay themselves these advances the land in question was sold. It is true that it appears some part of the debt was incurred by the testator's widow, but the greater bulk of it was that of the testator. The land was sold for \$2,000, which would leave a large surplus for the children heirs at law. This is, of course, no objection to the sale if there were any debts, because, as said in *Spalding v. Shalmer*, 1 Vern. 303, "if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser, for he is not obliged to enter into the account." This fact, however, explains what is said in the evidence, viz., that the executor told the plaintiff that he could throw off nothing if the purchase was paid in advance, as the money was to be distributed among the heirs. This was at a time when about \$900 had been paid by instalments

on the price, which would more than suffice to recoup the executors, and the balance would be for the children.

The evidence then shews affirmatively that there were debts of the testator at the time of the sale, and I hold that the executors had power to sell, and can make a good title : *Foster v. Peacock*, 18 M. & W. 630 ; *Colyer v. Finch*, 5 H. L. Cas. at p. 922, per Lord Cranworth.

The will shows on its face an intention that the executors shall apply the proceeds of the lands to the payment of debts. Therefore they have by implication a power to sell the fee simple. That being so, and a duty being cast upon them to act in the discharge of debts, they can convey a good title to such of the lands as they sell for the payment of debts : *Kenrick v. Beauclerk*, 3 B. & P. 175 : *Tylden v. Hyde*, 2 S. & S. 238. It is only the *residue* of the estate which passes under the will or to the heir, after taking out what is required for the payment of debts : that which is required for the purposes of the executorial duty directed by the testator is subject to the control of the executors, who can sell and make a good title thereto. This I think they could do without the concurrence of the heir, even before the Act, R. S. O., ch. 107, sec. 19. That section may, I think, be fairly read so as to apply to such a case as this, where the lands have been charged by the testator with the payment of debts, and executors appointed who are directed to pay them, and then no further devise is made as to the particular parcel in question. He has not within the meaning of that section devised the real estate charged in such terms as that his whole estate and interest therein have become expressly vested in any trustee, but he has devised it to such an extent as to create a charge thereon, which the Act in effect transmutes into a trust, and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator.

I overrule the finding of the Master that the plaintiff is not able to make a good title, with costs, and I dismiss the action, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

ROSS ET AL. V. MACHAR.

Corporation—Action for calls—Proof of defendant being a stockholder—Proof of calls and of notice—Sending notice by post.

Shares had been assigned in the Company's books by the managing director in his own name, as to twenty shares, and as attorney for another, as to thirty, to the defendant, who did not sign the usual formal acceptance for any of them, but a certificate under the corporate seal of the Company and the signature of the President, Vice-President and Secretary of the Company was sent to him, certifying that he was the registered owner of the twenty shares; and defendant had, in a bill filed against a third party for fraudulently inducing him to purchase the shares, for which he had paid \$500, admitted that he had purchased the fifty shares: *Held*, that defendant was a shareholder as to these fifty shares.

Sembler, that if any further formal acts were required to be done on the part of the defendant to constitute him a shareholder he could be directed to perform it.

Under the circumstances shewn in the evidence set out below, *Held*, O'CONNOR, J., dissenting, that secondary evidence of the contents of the minute book of the company, shewing the making of certain calls, was improperly rejected.

By 41 Vic. ch. 58, D., the three plaintiffs were appointed "joint assignees" of the Canada Agricultural Insurance Co. for the purpose of winding up under 41 Vic. ch. 21. D. Two of the plaintiffs, the third being unable to attend through illness, met on the 2nd of January, 1879, and made the 4th and 5th calls of 10 per cent. each on the stock of the Company. *Held*, that the assignees must all join in making calls, and that these calls were therefore invalid.

Held, also, that a meeting of the three joint assignees on the 27th of January, after notice of the 4th and 5th calls had been mailed on the 13th of January, purporting to confirm the action of the two assignees of the 2nd of January, had not that effect.

The charter of the Company, 35 Vic. ch. 104, D., provides that one month's notice of calls "shall be given." *Per* O'CONNOR, J., sending such notice by post was not a compliance with this provision.

THIS was an action for four calls—the second, third, fourth, and fifth—of ten per cent. each, upon fifty shares of \$100 each of the stock of the company of which the plaintiffs were the assignees.

The trial took place at the Assizes at Kingston before Cameron, C. J.

The second and third calls were abandoned because the learned Chief Justice ruled there was not a sufficient foundation laid for the admission of secondary evidence of these calls having been made, as the minute book of the company containing the proceedings with respect to them was not produced, as it was alleged to have-

been lost, and sufficient evidence, it was ruled, had not been given of a full search having been made for it.

As to the fourth and fifth calls, the jury found that notice of them had been duly mailed by the company to the defendant's address, but that he had never received it, and the action was therefore dismissed, with costs.

The facts of the case are stated in the judgment.

At the Michaelmas sittings of the Court *Arnoldi*, for the plaintiffs, obtained an order *nisi*, calling upon the defendant to shew cause why the judgment given herein should not be set aside and judgment entered for the plaintiffs on the findings of the jury; or why the verdict and judgment should not be set aside, and a verdict be entered for the plaintiffs; or a new trial had on the following grounds:

1. The learned Chief Justice wrongly refused to admit material and necessary evidence tendered by the plaintiffs, viz., secondary evidence of the minute book of the board of directors of the company, and of the contents thereof; and also erred in ruling that the plaintiffs had not laid sufficient foundation in their evidence at the trial to justify the admission of such secondary evidence.

2. The learned Chief Justice erred in permitting the defendant to give evidence that he had not received the notices of the fourth and fifth calls after proof of the due mailing of the same to his address.

3. The learned Chief Justice misdirected the jury in telling them that the only question they had to decide was, whether the defendant received the notices of the fourth and fifth calls, or either of them, whereas the jury should have been told that if they were satisfied the notices had been duly mailed to the defendant they should find for the plaintiffs, and that the defendant's denial of the receipt of them was immaterial.

4. And for misdirection, in that the jury should have been told that if they found the notices of calls, or either of them, had been duly mailed to the defendant's address, the receipt of the same by him should be presumed.

5. The case should have been withdrawn from the jury when there was no question of fact to be decided by the jury, the question involved being purely a matter of law as to the due giving of the said notices for the fourth and fifth calls upon the undisputed evidence.

6. And that the verdict and judgment should have been for the plaintiffs.

Notice of motion to the like effect was also given.

Machar, in person, shewed cause.

Secondary evidence was rightly rejected in this cause. [ARMOUR, J., referred to *Brown v. Morrow*, 43 U. C. R. 436; *McGahey v. Alston*, 2 M. & W. 206.]

The resolution does not fix the place where the calls are to be paid.

The mere mailing of the notices of calls is not sufficient; it must be shewn the defendant received them: *Union Fire Ins. Co. v. Fitzsimmons*, 32 C. P. 602; *McCann v. The Waterloo Mutual Fire Ins. Co.*, 34 U. C. R. 376; *Nasmyth v. Manning*, 5 A. R. 126. The fourth and fifth calls were made by two only out of the three trustees or assignees, whereas the calls should have been made by all three of them. The 41 Vict. c. 38, D., is the Act giving the plaintiffs the right to act. See also *Lewin on Trusts*, 398. *In re Metropolitan Bank v. Jones*, 3 Ch. D. 366. There was no complete transfer from Goff and Vandewater, the two stockholders from whom it is said the defendant derived his shares: 35 Vict. ch. 104, secs, 15-17, D.; Article 6 of the By-laws of the Company. No transfer entry was ever made to defendant in the books of the company, nor did he ever accept a transfer, nor did the directors assent; *Fyfe's Case*, L. R. 4 Ch. 769; *Heritage's Case*, L. R. 9 Eq. 5; *Lindley on Partnership*, 4th ed., pp. 131-140; *New Brunswick and Canada R. and Land Co. (Limited) v. Muggeridge*, 4 H. & N. 160.

Arnoldi, supported the order *nisi*. As to notice by mailing letter, see *Union Fire Ins. Co. v. O'Garu*, 4 O. R. 359; *Lindley on Partnership*, last ed. 643; *Woodcock v.*

Houldsworth, 16 M. & W. 124. The secondary evidence should have been received, as every reasonable search was made for the missing book, and it could not be found. A sealed certified copy of the resolution in the minute book would have been sufficient evidence: 35 Vic. ch. 104, sec. 12. All three assignees acted in making the calls, because they met and confirmed the call which two of them alone had before made, and it was after that confirmation the notice of calls was given. The evidence shews the defendant, if he has not formally accepted the shares, has so dealt with them by the proceedings in Chancery in respect of them, and otherwise, that he is bound to accept them formally, if necessary. The formalities are for the benefit and protection of the company.

March 7, 1885. WILSON, C. J.—The Canada Agricultural Insurance Company was incorporated by the 35 Vic. ch. 104, (D.). By the 41 Vic. ch. 21, (D.), insolvent incorporated Fire or Marine Insurance Companies were made subject to the Insolvent Act of 1875, but subject to the modifications contained in section 147 of that Act and to the other special modifications contained in the 41 Vic. ch. 21; and by the 41 Vic. ch. 38, (D.), private Act, this company was specially provided for. The company had appointed Ross and Fish, two of the present plaintiffs, trustees and liquidators, and by the Act Dumesnil, the other plaintiff, was added as a trustee and liquidator, and the three plaintiffs were constituted the first assignees of the company and official assignees "as if under the said General Act (41 Vic. ch. 21) the company had become on the day of the passing hereof insolvent and had on the said day made an assignment under the said Act to the said parties." Mr. Ross, one of the plaintiffs, said that he and Mr. Dumesnil made the fourth and fifth calls on the 2nd of January, 1879, of ten per cent. each; the fourth call being made payable on the 2nd of April, and the fifth call on the 2nd of July, Mr. Fish being absent on account of illness. At the next meeting

all three assignees were present ; that was on the 27th of January ; and at that meeting the minutes of the previous meeting were read and sustained, and then they proceeded to advertise the calls and issue circulars. These are the calls for which the mailed notice was sent by the plaintiffs, but was not received by the defendant, as the jury found.

The account of the defendant in the ledger of the company is, that on the 17th of February, 1877, there were transferred to him by Mr. Goff 20 shares, \$2,000, on which there had been paid \$200, leaving unpaid \$1,800, and on the 19th of the same month there were transferred to the defendant's account by Mr. Vandewater 30 shares, \$3,000, on which there had been paid \$300, leaving \$2,700 unpaid.

Then there is a certificate of the 17th of February, 1877, under the seal of the company and the signature of the president, vice-president, and secretary of the company, that the defendant is the registered proprietor of 20 shares, transferable in the books of the company, subject to and in accordance with the by-laws of the company.

On the 17th of February, 1877, Goff assigned 20 shares to the defendant by one of the forms of the company used for the purpose, and on the 19th of February Vandewater, by one of the like forms, assigned 30 shares to the defendant.

At the foot of each of these transfers is a form of acceptance of the transfer to be signed by the transferee, but these forms have not been signed by him.

It is not disputed that the defendant never formally accepted these transfers.

Mr. Vandewater said he handed to the defendant the certificate for the thirty shares which he had, and the defendant produced it at the trial. Vandewater said the defendant paid him \$300 for the transfer ; that is, the defendant paid to him the ten per cent which Vandewater had paid upon the stock to the company. The defendant, at the same time, desired Vandewater to buy for him the twenty shares from Goff, which Vandewater did ; and the defendant afterwards filed a bill in Chancery against

Vandewater, and got a decree against him for the \$200 of the Goff stock, which decree Vandewater paid; and the defendant afterwards, on the 5th of May, 1879, released Vandewater from all liability under the judgment and decree in Chancery on payment of \$130, and on payment of a mortgage from Ellen Paver assigned to him. The defendant never returned to Vandewater any of the transfers of stock.

Vandewater said the defendant after that asked him to sell the stock for him, the defendant. The defendant denied receiving the notice of the 2nd January, 1879. He said he did receive a notice of the 22nd August, 1879, asking for payment of the second call.

The only evidence of the second and third calls having been made was contained in the minute book of the company, and as it could not be produced, and as secondary evidence of it was excluded, the plaintiffs had to abandon their claim for them.

The bill in Chancery filed by the defendant against Vandewater about the beginning of the year 1878, states that the now defendant in February, 1877, at the request of Vandewater purchased fifty shares of the stock in question, on which ten per cent. had been paid at par: that Vandewater did not disclose that twenty of these shares then belonged to Goff. Vandewater on the 21st of February, 1877, gave to the now defendant a certificate for thirty shares of the stock then standing in Vandewater's name, along with an assignment of the said shares from Vandewater to the now defendant, and a certificate for the other twenty shares made out in the name of the now defendant, and he requested the now defendant to pay for the same the sum of \$500, and the now defendant gave to Vandewater his promissory notes for \$200 and \$300, the former being in favour of Goff, and the latter in favour of Vandewater, and the now defendant afterwards paid these notes.

The now defendant states in the bill that the company had made a call upon him for ten per cent. for which they now threaten to sue him.

The now defendant made charges of misrepresentation and fraud against Vandewater, by means of which the now defendant was induced to take the stock.

The result of the suit was :

1. That the now defendant should be paid by Vandewater \$200 for the twenty shares transferred by Goff to the now defendant, with interest thereon from the time the now defendant paid for the same, and his costs in respect thereof, which sum amounted to \$467.42.

2. That Vandewater should forthwith pay that amount, and in the event of the plaintiff being compelled to pay any calls in respect of the twenty shares, it should be referred to the Master to take an account of such moneys as the now defendant may be compelled to pay, and of any costs which he may properly incur in defending any action brought to enforce such payment.

The now defendant stated in his bill he did not admit he was liable for calls, nor the sufficiency of the transfer or attempted transfer to constitute him the owner of the said stock ; and he submitted it should be declared that the sale of the stock, at any rate as between him and Vandewater, was conditional upon the truth of Vandewater's representations, and should be rescinded ; and he alleged the transfer was invalid because not made in the books of the company, and that it had never been assented to by the directors.

The evidence so far shews :

1. That the books of the company shew a transfer duly made in the books of the company of the twenty shares from Goff's account to that of the defendant, and a like transfer of the thirty shares from Vandewater's account to that of the defendant on the 17th and 19th of February 1877.

2. That the defendant got the transfers of the twenty and of the thirty shares from Goff and Vandewater respectively, and repaid them the paid up 10 per cent. thereon amounting to \$500, on the same dates last mentioned.

3. That he got under the seal of the company and the signatures of the president, vice-president, and secretary of the company, a certificate that he was the registered proprietor of the twenty shares, on the 17th February, 1877.

4. That the defendant by his bill in Chancery against Vandewater admits he bought those fifty shares and paid for them, and he has not been relieved from liability for or in respect of the thirty shares in any respect, nor in respect of the twenty shares upon which he was successful in that suit. With respect to these twenty shares he was directed to be indemnified by Vandewater in case he, the defendant, was compelled by the company to pay any calls made upon these twenty shares.

5. The defendant, in consideration of the sum of \$130, and of the payment of a mortgage assigned to him, has released Vandewater "from all liability under and by virtue of the judgment and decree in the suit of *Machar v. Vandewater*;" so he has no longer any claim upon Vandewater for indemnity against any calls he may be compelled to pay upon the twenty shares; and he did not obtain relief of any kind upon the thirty shares.

The 35 Vic. ch. 104, sec. 17, D., enacts that no transfer of any share shall be valid until entered in the books of the company according to such form as may be fixed by the by-laws, and until the whole of the capital stock of the company is paid up it shall be necessary to obtain the consent of the directors. And the by-laws provide that no transfer of stock shall be valid unless made upon the books of the company by the person or persons owning such stock, or by his, her, or their attorney, legally appointed, or in case of death by their legal representatives; nor shall such transfer be valid until all or any claim or demand due or to become due to the company by the person or persons owning such stock shall have previously been paid or secured to the satisfaction of the directors.

These two transfers of the 20 and 30 shares were, in fact, entered in the books of the company.

The 30 shares were directed by Vandewater to be transferred to the defendant by Goff, the duly appointed attorney of Vandewater, to the defendant in the books of the company, and that was done.

And as to the 20 shares, Goff, who was the managing director of the company, must have authorized the transfer from his own account to that of the defendant of the 20 shares; and besides that, for those 20 shares there is the certificate of the 17th of February, 1877, under the seal of the company and the signatures of the president, vice-president and secretary of the company, that the defendant is the registered owner of these 20 shares.

I am quite satisfied the 30 shares were duly transferred according to the statute and by-laws of the company, and that the 20 shares were also duly transferred, looking to the actual assignment from Goff to the defendant of the same, and the certificate of the company last referred to; the position of Goff as managing-director, from whose account that transfer was made, and the other facts of the case; the payment made upon them by the defendant; and the admission in his bill in Chancery that he did in fact purchase these shares; and the settlement he made with Vandewater, that he has now no claim upon him in respect of these 20 shares; and the fact that he has retained these shares in his own name, without ever claiming from the company the right to be relieved from them—shew the defendant is the legal holder of these shares.

It seems to me unquestionable that neither the company nor the assignees of the company can dispute the defendant's right to be treated as a shareholder of any of these 50 shares in the stock of the company, if he desired to claim the stock, and there is abundant evidence that he did in fact accept the stock. There is no special mode required to signify that acceptance by the Act or by the by-law.

I am of opinion the defendant, if anything further be formally required to constitute him a shareholder, may be directed to perform it, or to submit to its being performed

by the company, or by any other person who should have performed it; but I do not know what act the defendant can be required to perform now, nor what act the company or any other person can be required to perform, to constitute him a shareholder of the company of these shares, more than he is one at the present time, which is, in my opinion, a shareholder in fact and in law in this company, and amenable of course to all calls duly made upon him by the company, or by their assignees, as representing the company.

The next question is, whether the evidence given of the loss of the minute book was sufficient to let in secondary evidence that the second and third calls had been duly made by the company.

The objection to the proof of these calls having been made was that the minute book of the company, in which the resolution to make the calls was entered, was not produced at the trial, because, it was said, after full search for it it could not be found; and in the absence of that book the certificates, dated respectively 7th and 18th December, 1877, of the entries in the minute book of the meetings held respectively on the 22nd February, 1877, when the second call was made, and on the 8th of November, 1877, when the third call was made, were not admissible because they were signed the first one by Dunesnil, as managing director of the company, under the seal of the company, and the second by Mr. Angus, as president of the company, also under the seal of the company, at a time when the affairs of the company were transferred to and vested in the assignees; and the dates of these certificates, the 7th and 18th of December, 1877, not being the true dates when they were signed. The certificates, therefore, which if properly given would have been admissible under the 35 Vic. ch. 104 sec. 12, were not available, and the plaintiffs were at the trial driven to rely upon the minute book itself; but that minute book was not forthcoming.

The evidence of the loss of the book was very fully given.

At the close of the evidence Mr. Ferguson said: "I submit now we have laid the foundation for secondary evidence."

The learned Chief Justice said: "I am not satisfied from the material we have had that every effort has been made to get the book. If the defendant really wants this book here I do not think you have accounted for the absence of the book sufficiently to allow secondary evidence of it."

Mr. Bethune.—"I am instructed to press the objection."

And the second and third calls were not further proceeded for.

Upon perusing the evidence as to the loss of the books, I cannot conceive what further could have been done by the plaintiff to trace or account for the minute book.

Mr. Ross searched everywhere for it excepting in the up-stairs vault in his office, which it is said is there. Mr. Ross, however, said there was no such up-stairs vault. Mr. Campbell said there was such a vault up-stairs. The minute book, after it was returned to his office, on Mr. Campbell's return from Sherbrooke, was removed to the vault up-stairs and he (Mr. Campbell) searched there also for it, and could not find it.

Mr. Senecal said there was an up-stairs vault, but no books were taken to it later than about a year and a half before Mr. Campbell had the book at Sherbrooke.

It cannot be suggested where else the search is to be made. It was returned to the company's office about September, 1880, and has never been taken from it since, and that office has been ransacked from top to bottom, and all the Court houses and lawyers' offices where it had ever been before that. It is the company's interest to produce it. It is their loss that they cannot find it. It rather appears the minute book was used in the Chancery proceedings of the now defendant against Vandewater.

In *Taylor* on Evidence, 6th ed. sec. 399, and the authorities there cited, the rule is laid down that "the party is generally expected to show he has in good faith exhausted in a reasonable degree all the sources of information and

means of discovery which the nature of the case would naturally suggest, and which were accessible to him. As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary inquiry addressed to the discretion of the Judge, the party offering secondary evidence need not on ordinary occasions have made a search for the original document as for stolen goods, nor be in a position to negative every possibility of its having been kept back."

The learned Chief Justice laid down too rigid a rule when he required it to be proved "that every effort had been made to get the book," and the secondary evidence proposed to be given should have been received.

We must either receive the evidence of the making of these second and third calls, or send the case for trial to have the necessary evidence taken on that part of the case.

We shall consider the other questions still to be disposed of before determining upon the course to be taken with respect to these calls. The question then is, were the fourth and fifth calls duly made?

These calls were made on the 2nd of January, 1879, when only two of the three assignees were present. At the next meeting, held on the 27th of the same month, all three assignees were present, and the minutes of the 2nd of January were read and sustained.

From the evidence of Senecal, the clerk, he says he posted all the notices by mail, and among them one to the defendant on the 13th of January, while Mr. Bethune in his objections taken at the close of the case states the mailing to have been upon the 30th of January. The one date is before the minutes were confirmed, the other is after the confirmation.

If the mailing was on the 13th, which was before the minutes of the 2nd were confirmed, I am of opinion the notice was insufficient on account of the calls having been made by the two and not by the three assignees: *Luke v. South Kensington Hotel Co.*, 11 Ch. D. 121; *Richardson v. Yonge*, L. R. 6 Ch. 478.

If the mailing were upon the 30th and after the confirmation of the minutes, I am of opinion the calls were properly made.

The evidence of Senecal shewed the notices were mailed upon the 13th, and before the confirmation, and he referred to a book in support of his testimony, and the calls were therefore not properly made. This view of the case really disposes of all further question as to the fourth and fifth calls. I shall say nothing at present about the effect of sending the notices by post.

The plaintiffs fail as to the fourth and fifth calls, but I think they are entitled to a new trial with respect to the second and third calls, and the new trial may as well be granted generally if they think they can better their case as to the fourth and fifth calls, and in that case there will be no costs of that trial or of this application, as the plaintiffs failed as to the fourth and fifth calls, and the defendant was wrong in the objection he took, by which the secondary evidence as to the first and second calls was excluded.

ARMOUR, J., concurred.

O'CONNOR, J.—This cause was tried at the last Kingston Assizes before Cameron, C. J., and a jury, and a verdict and judgment rendered for the defendant.

The Canada Agricultural Insurance Company was incorporated by an Act of the Parliament of Canada, 35 Vic. (1872) ch. 104, (D). Section 6 of the Act provided that the capital stock subscribed for shall be paid in by instalments "at such times and places as the directors shall appoint: no such instalment shall exceed ten per cent., and not less than one month's notice thereof shall be given."

Section 12 provides, (*inter alia*) that on the trial of actions brought to recover arrears of instalments due upon shares "it shall only be necessary to prove that the defendant was owner of the said shares of the company, that such calls were made, and that notice was given as directed by this Act."

In 1877 the company became embarrassed and unable to meet its liabilities or proceed with its business, and in 1878 another Act, 41 Vic. ch. 38 was passed, (subject to "any general Act passed during the same session to make provisions for the winding up of insolvent incorporated Insurance Companies,") by which the assets and estate of the company became vested in Philip S. Ross, William T. Fish, and George H. Dumesnill, as joint assignees ; " and the said company and the said parties, and all persons interested therein as shareholders, creditors, policy holders, or otherwise, shall thenceforward be, to all intents and purposes, in the same position as if the said parties were official assignees, and as if under the said general Act the said company had become on the day of the passing thereof insolvent, and had on the said day made an assignment under the said Act to the said parties."

In the same session of the Parliament of Canada a general Act, chaptered 21, such as the one alluded to in the last-mentioned Act, was passed, for the winding up of insolvent incorporated fire or marine insurance companies.

The first section of the last Act provides that the Insolvent Act of 1875 shall apply to such companies, subject to the modifications contained in the 147th section thereof, and to other additional modifications provided in the sections which follow.

By the eleventh section : "The assignee shall have the powers vested in a receiver under the provisions of the said 147th section," &c. And this, I apprehend conferred on the assignees power to make calls on stock and enforce payment thereof, which otherwise they would not possess.

The 17th section of the Act 35 Vic. ch. 104, incorporating the company, provides that : "No transfer of any share of the stock of the said company shall be valid until entered in the books of the said company, according to such form as may, from time to time, be fixed by the by-laws."

It appears by the evidence that the defendant in 1877 became the transferee and owner of fifty shares of the

company's stock assigned to him by two several stock-holders, and on which ten per cent., the amount of a first instalment or call, had been paid.

It is alleged that in the same year, and after the defendant became such owner, two—a second and third—calls of ten per cent. each were made ; and on the 2nd of January, 1879, two of the assignees met and made a fourth and fifth call, the fourth payable on the 2nd April, and the fifth on the 2nd of July, 1879, of ten per cent each.

These last two calls were afterwards, it is claimed, ratified at a meeting of the three assignees on the 27th of January, 1879. This is sworn to by the plaintiff Ross, who also says he gave instructions to Joseph E. Senecal, a clerk of the assignees, to publish notice of these same two calls in two newspapers, the *Montreal Gazette* and *Nouveau Monde*, and to send notices to the shareholders on whose stock the calls were made. Here there seems a singular discrepancy in the evidence. Senecal when called says (as reported by the shorthand reporter) that he mailed the notices to the stockholders in the Montreal post office on the 13th of January ; but the newspapers showed it appeared in them first on the 4th of January, and last on the 1st of February. In the argument of counsel for defence at the trial the 30th of January is mentioned as the date of mailing the notices, which appears to be incorrect, although something of that kind seems to have appeared then ; but the notice mailed is a printed one, prepared by the clerk, and never was signed by the assignees.

It was dated the 2nd January, 1879, and gives notice that a fourth and fifth calls had been that day made. If the defendant received the notice and made enquiry, he would find that only two of the joint assignees were present at the meeting of the 2nd January, and that the calls were made by those two only.

There can scarcely be a doubt, as a matter of law, I think, that such calls were invalid, and the defendant might treat them as null and void. But on the 27th of January, another meeting of the assignees was held, at which the

three were present, and the minutes of the 2nd were read and approved. This would possibly cure the defect and make the calls valid in that respect, although it does not appear to have been the intention to do so. It seems rather that there was no question as to the power of the majority of the assignees to make the calls, and the minutes were read and approved, as they usually were, *pro forma*, from meeting to meeting, as a matter of ordinary business. However that may be, the notice if sent after, ought to have mentioned the meeting of the 27th, and stated that the calls were confirmed thereat; but it contained no such statement, so that the defendant was only notified of the invalid calls. If the notice was mailed on the 13th of January, as stated by Senecal, as reported, and that it appears is true, it could not contain such information, because the meeting, which it is contended confirmed the calls, had not then taken place.

If the notice was mailed on the 20th of January, it was misleading, if it was intended to rely on the confirmation of the 27th, which in that case would be really the date of making the calls. Regarded then in any view, the notice which was mailed was not the notice required to be given, and therefore it was in law, with reference to the calls in question, no notice; and in short the calls were invalid. But from the view which I take of the notice in another aspect, it becomes unnecessary to pursue that question further than to say it appears clearly fatal to the action for those calls.

Section 6 of the Act of Incorporation provides that one month's notice of calls "shall be *given*." The assignees, in their resolution of the 2nd of January, 1879, say, notice "shall be *sent*" to each shareholder, and then they sent it by post. Was that *giving* notice in the legal sense? I think it was not.

In the case of notice to endorsers of promissory notes and drawers of bills of exchange, our statutes provide that notice is well given if it be mailed to the proper address of the person to be notified; so that in this country, at least,

no argument applying to the point in question can be drawn from that source. In many railway and other Acts incorporating companies a similar provision is made; but in cases for which there is no statutory provision as to the mode of giving notice, it must be given, I apprehend, as required by the common law; that is, in such a manner that the fact of delivery to or receipt by the person to be notified may be proved. Between the mailing of a letter and the receipt of it by the person addressed there are too many possibilities of miscarriage. Letters, after being posted, have to be handled, assorted marked, wrapped, bagged, and handled by several before they leave the office of deposit; and again opened, handled, marked and distributed at the receiving office, besides the mishaps of the way.

Who can tell when or how a letter may be mislaid, may slip aside, or otherwise go astray in such handling; besides, there is a chance of delivery to a wrong person, which not infrequently occurs. With reference to these, the fourth and fifth calls, therefore, I fully concur with the learned Chief Justice who tried the case, that the notice required by the statute was not given to the defendant before this action was brought, and so far at least the action must fail.

This view of what is meant by giving notice is supported by *McCann v. The Waterloo City Mutual Fire Insurance Co.*, 34 U. C. R. 376.

The British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108, is a strong case against the notice herein. See also Lord Romilly, in *Reidpath's Case*, L. R. 11 Eq. 86. The case in 6 Ex. 108, is stated to be overruled, however, by *Grant's Case*, in Appeal, 4 Ex. D. 218.

I am forced to this conclusion with great diffidence and reluctance, because it places me somewhat in opposition to the judgment of the Common Pleas in the *Union Fire Ins. Co. v. Fitzsimmons*, and the *Same v. Shields*, 32 C. P. 602.

The original judgment was delivered by Hagarty, C.J.

55—VOL. VIII. O.R.

(now Chief Justice of Ontario), who tried the case and took time for consideration, and whose talents, legal acquirements, and great experience entitle his opinions in all legal matters to the highest consideration and respect; and in that case his decision was substantially adopted by the full Court. But I am bound to express the conclusion to which the exercise of my own reason impels me. The decision being of a Court of co-ordinate jurisdiction is not, I think, under the conditions of this case binding as an authority, so as to preclude the exercise of my own judgment here on a new point, though it is entitled to be treated with respect and deference. It is remarkable that the question arises in this case from the ruling of the present Chief Justice of the same Court, which ruling is contrary to the decision referred to; so that there is a conflict of decision.

The judgment just mentioned claims to be founded for the most part on certain English cases which are referred to. The learned Chief Justice says: "The plaintiff's counsel insist that the delivery in good time to the post office, was a good delivery to the defendants. The strongest case on this is, *Household Fire, &c., Ins. Co. v. Grant*, L. R. 4 Ex. D. 218, in the Court of Appeal, (1879)." The facts of that case were shortly (as far as necessary for the purposes of this case) these: One Kenrick was agent of the company in Glamorganshire for placing shares. On the 30th September the defendant handed in an application, addressed to the company, for shares in the company, stating that he had paid to their bankers £5, being a deposit of 1s. per share, and requesting an allotment to him of 100 shares, and agreeing to pay the further sum of 19s. per share within twelve months of the date of the allotment.

Kenrick forwarded the application by post to the plaintiffs in London, and the secretary of the company, on the 20th October, 1874, made out the letter of the allotment in favour of the defendant, which was posted, addressed to the defendant at his residence, 16 Herbert Street, Swansea,

Glamorganshire. His name was then entered in the register of shareholders. This letter of allotment never reached the defendant, and he paid no more on these shares.

In 1877 the company went into liquidation, and the liquidator sued for the unpaid balance. The Court held that depositing the notice in the post office, properly addressed to the defendant, was good as a notice then given.

The Court in that case relied on the authority of *Dunlop v. Higgins*, 1 H. L. Cas. 381, in which the prior decisions on the point were reviewed. The decision was, where an offer or proposal was sent by mail the posting of a letter in answer accepting the offer constitutes a binding contract; and the reason of that is, that the postal department is the common agent of both parties; that is to say, the proposer, by sending his proposal by mail, tacitly invites an answer through the same medium; and thus the post office is, by implication, made the common agent of both parties.

Thesiger, L. J., in delivering judgment, says, 4 Ex. D. 221 : "But if the post-office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the officer himself as his agent to deliver the offer and receive the acceptance."

With reference to the above case the Chief Justice remarks that he does not consider it to be held essential that "the offer is made by post and accepted by post." "In the case" (he adds) "before the Lords Justices, the application was delivered by the defendant personally to the agent of the company in the country, and he forwarded the application to the head office in London," &c.

With due submission, however, this distinction seems apparent rather than substantial.

The defendant in that case knew the agent, who was an agent to place shares only, could not deal with the application, and that he would necessarily send it by post

to the head office; and in delivering it to the agent must be inferred an implied, if there was not an express, direction to send the proposal by post. It is worthy of remark also that nothing appears in the report of the case to shew that the company knew or were informed that the document had been transmitted to the head office by their agent in the country, their agent, however, not for that but a different purpose.

It was the same then as if he had delivered the proposal to any other person to be posted. If I am right in my view as regards this question all the English decisions on that point are founded on the principle, that a proposer seeking to contract with another by sending his proposal by post tacitly proposes also, or consents by that act, that the acceptance be sent to him through the same medium; and as a letter addressed to another person when posted leaves the control of the sender, it becomes at once the property of the person for whom it is posted.

The acceptance therefore takes effect from the time of posting it, for the sender cannot afterwards recall it.

In the case *Dunlop v. Higgins* Lord Cottenham refers to the practice of sending by post a notice of the dishonour of a bill of exchange, as it seemed that rested wholly on the same principle as that which was applied in *Dunlop v. Higgins* itself.

This, I apprehend, is not his meaning. The practice recognized by law of giving such notices of dishonour through the post office is a matter of commercial law, a custom arising from the necessities of trade and commerce, and is universal.

The other principle is founded on an understanding or agreement express or implied between the parties, and is agreeable to public policy. At this point the principles meet, so to speak, and merge or form one. Thenceforth the principle derived from these two different sources—one derived from law, the other founded on contract—applies alike to giving of notice of dishonour, and the notice of acceptance of a proposal. *Dunlop v. Higgins* arose from

a mercantile transaction, wherein the notice of acceptance was required and regulated by a custom of the trade.

But in this case, as well as in the case in the Common Pleas, the point for decision respecting the notice sent by mail does not arise from a proposal to purchase sent by post. The defendant's stock (if he was the legal owner of any) was assigned to him by private owners of shares; and he had no dealings, no communication, with the company or its head office. The notice sent was the act, *sua sponte*, of the plaintiffs, and not in answer to any communication from the defendant, but casually, as occasion required, in the discharge of their duties.

Although the defendant (assuming that he was a stockholder) must have known that he was liable to the payment of calls at one time or another, yet he knew also that he was entitled to one month's notice to enable him to prepare to pay, and so prevent suit. Until he received that notice he might remain securely passive.

The language of the Ontario Act, which had to be interpreted in the case in the Common Pleas, is, as regards notice, substantially the same as that of the Act incorporating this company. It is: "No call shall exceed ten per centum, and thirty days' notice shall be given of every such call."

The learned Chief Justice construes this to mean that the notice may be sent by mail, and that the fact and time of mailing must be regarded as the giving of notice and the time thereof. This construction appears to me altogether too broad. The expression "notice shall be given," is by no means the equivalent of "notice may be given by depositing it, properly addressed, in the post office."

It seems to me that such a construction savours more of making than of expounding the law. The verb "to give" has in its plain common acceptation no such meaning; and when a statute says one party shall give notice to another, I do not see how by any fair intendment it may be interpreted to mean transmit through or deposit in the post office. Such a construction imports into the clause a term which was not intended, is not implied in, and cannot be deduced from the language of it.

I would venture to call the process interpretation by infusion, rather than by explication or deduction.

In *Warburton v. Loveland*, 2 Dow & Cl. 489, it is said: "Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the Legislature."

In *Miller v. Salomons*, 7 Ex. 560, Pollock, C. B., said: "If the meaning of the language used by the Legislature be clear and plain, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right or the contrary; we have nothing to do but to obey it, and administer it as we find it; and I think to take a different view is to abandon the office of Judge and assume that of legislator."

In *re Barker*, 7 H. & N. 117, Bramwell, B., said: "Though I concede that we must deal with Acts of Parliament as lawyers, still, when I find plain language of this sort," &c. This question is discussed in *Wilberforce* on Statutes, pp. 102, 103, and 104.

I have not, however, met with any case in the English Courts, wherein the clear, distinct words of a statute have been construed as they have been in the *Union Co. v. Fitzsimmons*, referred to. The cases there arose, for the most part, on proposals for a contract, allotment of shares, &c., and the transactions took place under particular circumstances, and not pursuant to an express direction of a statute clearly and distinctly expressed in plain, well understood words. See observations on this subject, and on the cases, in *Pollock* on Contracts, pp. 35 and 36.

There still remains for consideration the other branch of the case, respecting the second and third calls, and the refusal of the learned Chief Justice to receive the secondary evidence tendered of the making of the calls, without the production of the minute book, by which alone it could be proved.

The learned Judge refused, on the ground that the absence of the book had not been sufficiently accounted

for, to let in secondary evidence of its contents. The book had been used as evidence in a great number of suits at Montreal, at Quebec, St. Johns, and at Sherbrooke, in the Province of Quebec; and at Ottawa, Kingston, and Belleville, in Ontario. It was last used in Court at Sherbrooke; but one Campbell, who had it in charge there, swears he brought it back to Montreal, and left it in the office of the assignees there. He thinks he put it in the safe or vault. Mr. Dumesnill says he saw it in the office after it was returned; and Mr. Ross says he is certain it was there after Campbell returned.

In some time afterwards it was missed. Search was made and it was not found in the office. Search was then made in the offices of the Courts at Quebec, St. John's, and Sherbrooke, in vain. But why search was made at these places is difficult to see, for Mr. Ross is perfectly certain it was not taken to or used at any of these places after it was at Sherbrooke in the charge of Campbell, who undoubtedly brought it back, and left it in the office of the assignees.

Mr. Ross was asked if he had searched for it, or caused search for it to be made, upstairs; but he said the assignees had no premises but on the ground floor; and when the question was pressed, and he was asked whether search had been made in the vault upstairs, he answered testily, and repeated, that they had no premises upstairs. Yet two of his own witnesses, clerks in his employ as assignee, swear that they had premises upstairs, and that there was a vault there which was a continuation of the vault down stairs; and further, one of them, Senecal, swears that books—old books of the estate—had been taken upstairs and put in that vault while he was employed in the office. He had left that employment about the end of 1880. But no search had been made upstairs, or in the vault there, after the book was missed and not found in the office below, although Campbell swears he understood that books had been taken up and left there after he left the book in the office.

But in connection with this there is another matter to be considered. Amongst the exhibits filed at the trial is one numbered "3," which purports to be a minute of what was resolved at a meeting of the three assignees held on the 15th June, 1878, shortly after the Relief Act, 41 Vic. ch. 38, passed, at which meeting it was resolved that "inasmuch as Mr. Ross cannot devote his whole time to this matter, that Mr. Fish be appointed to give his whole time and attention to the affairs, and that Mr. Dumesnill give more or less time and attention as he can spare daily," &c.

Thus it appears Mr. Fish was to be the real business manager and operator in the affairs of the estate, with only occasional assistance from the other two.

Mr Fish, then, above all would be the one to account for the absence of the book. He may have taken or sent it to the vault up stairs, or sent it to be used elsewhere, as Mr. Dumesnill gave it to Campbell, who was not then an employee, to take to Sherbrooke. But Mr. Fish was not called as a witness, nor does it appear that he was even asked about it. Mr. Ross's action with regard to this book is of a kind disagreeably suggestive. Sending to search in places where he says he knew it could not be, but neglecting to search the room and vault upstairs where it might be; his denial of their having premises of the kind upstairs, and his apparent neglect to make inquiry of Mr. Fish, the real manager, or to procure his attendance as a witness at the trial, are together a sufficient reason to warrant a strict application of the rule respecting the admissibility of secondary evidence; and especially should this be done in reference to a record of proceedings, the object of which is to charge an absent person with the payment of money.

Upon the whole evidence I have no doubt that the Chief Justice properly rejected the secondary evidence tendered, and, if he had any discretion in applying the rule, he properly used that discretion against the plaintiffs under the circumstances mentioned.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

THOMAS V. CAMERON ET AL.

Lease—Landlord and tenant—Goods of third party—Right to distrain.

C., having paid rent due by R. to H., in order to secure the sum so paid and other advances, took an assignment of the residue of the term from R., who forthwith took a lease from C. for a term of three months, the rental being the amount of C.'s advances to R.

Held, that such a lease, however binding between the parties, could not create the relation of landlord and tenant so as to enable C. to distrain the goods of third parties on the premises, the intention, as disclosed by the evidence set out below, being manifestly not to create such relation except as a scheme to enable C. to seize such goods,

REPLEVIN for a piano.

The defendants pleaded :

1. They did not detain the goods.
2. The goods were the goods of the defendant Cameron, and not of the plaintiff.

3. That one Elizabeth Rowe, during all the time for which the rent mentioned to be distrained for accrued due, and thence until and at the time of the alleged taking and detention of the said goods, was tenant of the defendant Cameron, of a dwelling house, No. 123 Market street, in the city of Hamilton, under a demise thereof for a term of three months, at a rent of \$82, payable in two equal portions of \$41, on the 17th days of May and July, 1884; and because \$41 of the rent, at the time of the alleged taking and detention, were due and in arrear from the said Elizabeth Rowe to the defendant Cameron, he, the said defendant, made his warrant for having distress of the same, and delivered the warrant to the other defendant Greenfield as his bailiff; and the defendant Cameron, as landlord, and Greenfield, as his bailiff, well acknowledged the taking and detention of the said goods, in the said dwelling house, and justly kept and detained the same as a distress for the said rent, still due and unpaid.

Issue.

The cause was tried at the last Winter Assizes, held at Hamilton, before Armour, J., without a jury.

The plaintiff had agreed to sell the piano to Mrs. Rowe, upon the terms that the piano was to remain her property

until she should pay for it. There was the ordinary receipt signed in such a case, containing the terms of the agreement. It was dated the 19th of July, 1882. On the 1st June, 1884, there were still \$289 due by Mrs. Rowe on the piano, and she had then had it for about 22 months. The plaintiff said :

" I found the piano in the auction room of Johnston & Gilmore, where it had been taken under a distress for rent. Greenfield told me he had seized it under a chattel mortgage, and the rent came in before that. I told him I did not think he could take it under a chattel mortgage, as it belonged to me. Hunter had it seized for rent, and I had to loan \$14 to free it from his distress. Then I went to the auctioneers, and demanded the piano from them. They would not give it to me till I saw Greenfield. I did see him, and he said he would not give the piano till he saw Cameron, that he held it under a chattel mortgage. Cameron told the bailiff not to let it go."

The defendant Cameron was examined, and said :

" I claim the piano under a landlord's warrant under this lease."

The evidence showed that Mrs. Helen Horsburgh owned the demised premises, and that on the 1st of May, 1883, she let them to Mrs. Rowe from year to year, and that Mrs. Rowe entered and paid rent : that on the 10th of May, 1884, Mrs. Rowe assigned her interest in the premises to the defendant Cameron in consideration of \$41 paid to her ; and that on the 12th of May, 1884, the defendant let the premises to Mrs. Rowe for three months from that day for the rent of \$82, to be paid \$41 on the 17th of May and \$41 on the 17th of July.

Cameron further said : " Mrs. Rowe early in May, 1884, came to me and wanted me to pay a note of hers which was coming due. At that time I was acting for Mr. Angus, who had a chattel mortgage on all her property. I saw the property and thought it was value for the \$40 she wanted, and I paid the note. About the 10th of the same month she came again and said her landlord was threatening her with a distress, and she wanted me to pay it: it was \$41. After refusing to do so, I agreed to make the payment for her if she would put me in

the same position as her landlord, which she agreed to; so she assigned her interest as tenant to me. She did not pay me the \$41 on the 17th of May. On the 27th of that month Greenfield asked me if I had any claim against her. I asked why, when he said she was packing up her things and leaving the city. I gave Greenfield a warrant for the rent. I gave Angus's chattel mortgage and my distress warrant to Greenfield, and under these the piano and other goods were seized. The goods sold for \$114. I had to pay \$27 for bailiff's expenses, and my \$41 rent is still unpaid. I did not know the plaintiff had any claim on the piano when I lent Mrs. Rowe the money."

In reply *Robert Hunter* said: "I was bailiff, and distrained for Mrs. Horsburgh on the goods on Mrs. Rowe's premises. Davidson was then in possession, and Mr. Angus's chattel mortgage. I seized the piano. I said, 'This will do me'; and I left Davidson in charge for me of the piano. Greenfield did not say he had any other claim than under the chattel mortgage. We agreed the piano should be removed to the auction room, and it was removed there under my warrant. The plaintiff afterwards paid me my rent, and I gave him an order for the piano."

Miss *Horsburgh* said: "I saw Mrs. Rowe packing up the things just across from our house. I went across and stopped her. She said she was moving. I told her she could not remove the things, because she had not paid her rent. Greenfield came that afternoon afterwards to make a seizure. We got Mr. Hunter to seize. It was for the May rent. My mother had been paid \$41 for the prior rent on the 10th of May."

Mr. *Fitzgerald* said that on the 31st of May Greenfield said he had seized the piano under the chattel mortgage and under Hunter's distress warrant, and he had no other claim against the piano.

The judgment was for the plaintiff and \$5 damages, with costs.

The defendants' solicitors served notice of their intention to move to set aside the verdict for the plaintiff, upon the ground that it was against law and evidence; and on the ground that the distress of the defendants was paramount to the claim of the plaintiff upon the piano.

February 12, 1885. *Osler*, Q. C., supported the motion. There was a reversion and the creation of a tenancy, and the distress was paramount to the plaintiff's title: *Woodfall*, 11th ed., 383, 384. Even a tenant from year to year, subletting in the same way, has a reversion sufficient to support a distress: *Curtis v. Wheeler*, Mood. & M. 493: *Oxley v. James*, 13 M. & W. 209; *Pike v. Eyre*, 9 B. & C. 909. As to the creation of a tenancy from year to year see *Woodfall*, 11th ed., 201, 202; *Rex v. Herstmonceaux*, 7 B. & C. 551; *Hastings Union v. Guardians of St. James's, Clerkenwell*, L. R. 1 Q. B. 38.

Fitzgerald, contra. The acts done by Jessie Horsburgh on the 27th of May, 1884, and prior to the seizure by Greenfield, were sufficient to constitute a distress on the piano in question: *Woodfall* on Landlord and Tenant, (12th ed.) p. 430; *Whimsell v. Giffard*, 3 O. R. 1; and the defendant Cameron was not entitled subsequently to distrain thereon, the same being then *in custodiu legis*; and also the inferior landlord was not entitled to distrain upon and assume possession of goods already distrained for rent by the superior landlord. Even if the distress made by Jessie Horsburgh was not a valid distress, the superior landlord Helen Horsburgh was entitled to distrain upon and assume possession of the piano, although held under a distress made by the inferior landlord Cameron; and for such reason and by virtue of the arrangement which was entered into between the bailiffs Greenfield and Hunter, at the time of the seizure made by Hunter, Greenfield must be considered as holding possession of the instrument as custodian of the same for Helen Horsburgh, and the plaintiff having satisfied the claim of Helen Horsburgh for rent was entitled to recover possession of the piano, if he demanded the same before it was brought back upon the demised premises, which he did. There was no *bond fide* tenancy existing between Elizabeth Rowe and the defendant Cameron, as is evidenced by the following facts. The rent reserved by the lease made by him to her is at the rate of over \$27 per

month, while the rent reserved in the lease made by Helen Horsburg is \$14 per month. The defendant Cameron admitted at the trial that he had no interest in the demised property, and that the assignment and lease were executed solely as a security for the repayment of the moneys advanced by him to Elizabeth Rowe; and after Mrs. Rowe's goods were seized Mrs. Horsburgh immediately resumed possession of her house, and the defendant Cameron never paid any rent to Mrs. Horsburgh. There being no *bond fide* intention on the part of Cameron and Elizabeth Rowe to create the actual relationship between them which these instruments professed to occasion, and the tenancy therefore being a mere sham one, the defendant Cameron merely possessed a license to seize the goods of Elizabeth Rowe and not the power to distrain upon the goods of a stranger upon the demised premises: *Ex parte Jackson*, L. R. 14 Ch. Div. 725; *Ex parte Williams*, L. R. 7 Ch. Div. 138; *The Trust and Loan Co. v. Lawrason*, 6 A. R. 286, and per Patterson, J. A., at p. 296. This device is an evasion of the Chattel Mortgage Act and a fraud thereon: *Trust and Loan Co. v. Lawrason*, 45 U. C. R. 176, and per Cameron, J., at p. 186; *Pollock on Contracts*, (3rd ed.) 271 and 272.

March 7, 1885. WILSON, C. J.—The evidence shews that Miss Horsburgh, for her mother on the afternoon of a day, saw Mrs. Rowe packing up her things to leave, and she went to the premises and forbid the packing, and told her she could not remove the goods till she paid the rent. After that, on the same day, Greenfield, having a warrant from Angus to seize under Angus's chattel mortgage on Mrs. Rowe's goods, which, however, would not affect the piano, which was held by Mrs. Rowe only under one of these hiring receipts, and having a warrant from Cameron to seize for \$41 for rent he claimed as the immediate landlord of Mrs. Rowe, went to the premises of Mrs. Rowe and seized. After that Hunter went in under a regular warrant from Mrs. Horsburgh, and distrained for her May rent for

\$14. It is said Greenfield, Cameron's bailiff, had first seized for Cameron's rent, and he is entitled to the first claim on the piano. The plaintiff says if Greenfield had the distress warrant from Cameron he did not act upon it, but only upon the warrant given to him to seize under Angus's chattel mortgage. The plaintiff said Greenfield stated he had seized under the chattel mortgage.

John T. Thomas said also Greenfield claimed to hold the goods under the chattel mortgage and nothing more, and he never heard from Greenfield or from Cameron of a landlord's warrant from Cameron.

Cameron said he gave Greenfield the chattel mortgage of Angus, and a warrant under it, and a distress warrant for himself, I understand, on the 27th of May.

Greenfield said he acted under the chattel mortgage and the distress warrant by seizing the piano under both on the 27th of May. The things were removed to the auction room the next day.

Robert Hunter said he seized under a warrant for Mrs. Horsburgh on the morning of the 28th of May. He found Davidson in possession for Greenfield. He said he held under the chattel mortgage. He did not say under anything else. Greenfield himself did not say he had any other claim than the chattel mortgage. "Davidson and I agreed to have the goods taken to the auction room, and they were taken there under Hunter's warrant."

Cameron wanted Hunter to get Mrs. Horsburgh to sign an assignment of the \$41 rent. Hunter said, "I heard nothing of Cameron's distress warrant up to that time." After the plaintiff paid the rent Hunter gave him an order on the auctioneers for the piano, and Mr. Hunter said he had not heard of Cameron's claim for rent before that time.

Miss Horsburgh said Hunter got the warrant for her mother's rent on the morning after she, Miss Horsburgh, had stopped Mrs. Rowe from removing her goods till the rent was paid.

That order not to remove the goods must have been on the 27th of May. Hunter did not get the warrant from

Mrs. Horsburgh till after Greenfield was in possession under the mortgage, having also Cameron's distress warrant.

Fitzgerald said on the 31st of May Cameron said the piano had been seized under a chattel mortgage, and under Hunter's distress warrant, and that he, Cameron, mentioned no other claims.

If the question is whether Cameron distrained for rent, or did not seize the piano excepting under the chattel mortgage, I should say the weight of evidence shews the seizure was not made by him under his distress warrant. If he said he had taken it under the mortgage, that could not have been, because the mortgage did not include the piano, either by name or by reference, or give a right to seize and sell any goods found on the premises.

Greenfield had it on the 28th of May, and he said he seized under it, but there is so much evidence against him that he had said to several persons he seized only under the chattel mortgage, and against Cameron himself in that respect, that it would be difficult to give the defendants relief on the ground that Greenfield had in fact distrained for rent before Hunter, the bailiff of Mrs. Horsburgh, distrained on the 28th, in the face of the finding of the learned Judge that the evidence shewed Greenfield did not make a distress at all. It is true a person having a right to distrain may seize for one cause, and justify for another legal cause, so as to prevent him from being treated as a trespasser; but I do not think a person having authority in fact to seize, and denying or not asserting that authority, while he knows another is claiming to make a seizure, and in consequence of his denial or repudiation of any exercise of authority by him that other does seize, can afterwards set it up to the prejudice of the one he has thereby induced to act as if he had not seized.

It was argued that the act of Miss Horsburgh, the authorized agent of her mother, the landlady and owner of the premises, in forbidding Mrs. Rowe to remove the goods until she paid the rent, was a distress in law made by the

landlady on the 27th of May, which was before Greenfield had been on the premises at all. *Wood v. Nunn*, 5 Bing. 10, shows that what was done and said by Miss Horsburgh was perhaps a sufficient distress of the goods of Mrs. Rowe; but the evidence shows she did not retain possession of the goods. See also *Whimsell v. Giffard*, 3 Ont. 1, and the cases there cited, the latest one being *Cramer v. Mott*, L.R. 5 Q. B. 357.

The distress made by the landlady by her agent on the 27th of May was a sufficient distress. The distrainor had the right to require the tenant to keep the goods taken on the premises. The not leaving a person in charge of them is not necessarily in law an abandonment of the distress. Retaining them on the premises is a sufficient impounding of them.

A question may, however, arise between an execution creditor and the landlord, who does not retain possession after making a distress, or a purchaser for valuable consideration without notice, as suggested by Littledale, J., in *Swann v. Falmouth*, 8 B. & C. at p. 460. So in this case the same question may arise between Mrs. Horsburgh, the head landlady, and Cameron, the sub-lessor.

Assuming, however, that Cameron could *prima facie* claim priority by his distress, because Mrs. Horsburgh did not keep the possession, he is met by the same objection, that he did not in fact make a distress, and by the further question, whether the claim by Cameron, as a landlord of Mrs. Rowe, was a valid and *bona fide* claim as one really interested or assuming to be interested in the demised premises.

Mrs. Horsburgh was the owner of the property, and she demised it to Mrs. Rowe as her tenant at a monthly rental of \$14.

Cameron lent money to Mrs. Rowe, and he had no security. He afterwards paid arrears of rent that she owed to Mrs. Horsburgh. His claim was then \$82.

To secure himself, and as a means of reaching the piano in question, which Mrs. Rowe had agreed to buy from the

plaintiff, and which she held by a hiring receipt only, and she having given a chattel mortgage upon her other goods to Mr. Cameron's client, Mr. Angus, Mr. Cameron got Mrs. Rowe to assign her leasehold interest to him for the expressed consideration of \$82, and he then gave her a lease of the same premises for three months from the 12th of May, 1884, at the rental of \$41, to be paid by her on the 17th of May, and \$41 on the 17th of July.

The property at that time was subject to the rent to Mrs. Horsburgh of \$14 a month, and it could not have been worth, in addition to that sum, Mr. Cameron's rent of \$82 for the three months his lease to Mrs. Rowe had to run.

It was manifestly not made for the real purpose of creating the true relationship of landlord and tenant between Cameron and Mrs. Rowe.

The object of it was to get some ground for seizing the goods upon the premises, no matter whose goods they were, for the satisfaction of his debt against Mrs. Rowe, who was truly the actual tenant of Mr. Horsburgh.

A lease made for such a purpose, however binding between the parties, cannot be supported against the just rights of others. It is a transaction which cannot justify the seizure of the plaintiff's piano to satisfy Mrs. Rowe's debt to Cameron : See *Trust and Loan Co. v. Lawrason*, 6 A. R. 286, and the cases referred to in 6 A. R. 296 *et seq.*.

I think the motion must be dismissed, with costs.

O'CONNOR, J.—I fully concur with his Lordship, the Chief Justice. To say that the relation of landlord and tenant in any proper legal sense of that term was created by the transaction between the defendant Cameron and Mrs. Rowe is, I think, simply absurd. There can hardly be a doubt, it appears to me, that the transaction was concocted to cover a scheme to "do" the owner of the piano out of the balance due to him of the price of the article, for the benefit of either Mrs. Rowe or the defendant Cameron. The assignment by Mrs. Rowe, on the 10th of

May, of the residue of her term for one year—about nine months—and the lease back to her for a term of three months at a bulk sum of \$82, the one half thereof payable on the 17th of the same month, and the other half on the 17th of July following, leaving the original rent to the landlord of the premises untouched and unprovided for, form a transaction too ridiculous in itself, and too palpably disclosing a scheme which can scarcely be adequately described by any other epithet than "fraudulent," to be treated as a *bond fide* letting of premises yielding rent, for which distress would lie, as between landlord and tenant; at all events, so as to make the property of a third person, which was on the premises before the transaction in question took place, liable to be distrained to satisfy the money demand fixed by that transaction.

The assignment of the residue of the term was made without the consent of the landlord, for the purpose partly of securing \$41 then lent by the defendant Cameron to Mrs. Rowe, to enable her to pay the rent then due, and partly to secure payment of money before then lent by him to her; but as the rent to the landlord was, in all probability, the full value of the user of the premises, the assignment would be of no value as a security.

Then further manipulation was needed to make nothing worth at least \$82, besides the rent. Hence the lease back for three months for the round sum of \$82, the debt due by Mrs. Rowe to Mr. Cameron, the object, the sole object apparently, being to "hook in" the piano, by means of a warrant of distress for rent. As between the parties, Mrs. Rowe and Mr. Cameron, probably the arrangement would stand, so as to enable Cameron to distrain her goods on the premises, after default in payment; but certainly the Court cannot permit the plaintiff to be deprived of his property by a scheme of the kind disclosed herein.

ARMOUR, J., concurred.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

BLISS V. BOECKH ET AL.

Highway—Obstruction—Accident—Action for damages—Contributory negligence.

The defendants' premises abutted on Clarence street in the city of Toronto.

The defendants placed a beam at the height of nine and a-half feet from the ground along the north limit of Clarence street, a street 29 feet in width, and hung a gate therefrom, and put up another gate across said street about 27 feet further south, the two gates not being exactly opposite to each other, nor of the same width. A lane ran north from said Clarence street. There was an accumulation of rubbish with ice and snow under the beam, which raised up the front wheels, and the plaintiff, while driving along Clarence street to deliver goods to persons on said lane, was injured by being crushed between the said beam and the load upon which he was seated. He said he knew of the beam, having driven there often, but that his attention was called from it by having to steer his way carefully between the two gates. Clarence street had not been adopted as a highway by by-law.

Held, that although by 46 Vict. cap. 18, sec. 545, O., the Council is prohibited from laying out a road or street of less than 66 feet in width, they may consent to the owner of lands laying one out less in width, and that prior to the Act of 1873 the owner was not prohibited from laying out a road of any particular width; and that as Clarence street had been laid out and used as a public street for many years, having several large business establishments fronting upon it, or with a rear access to it, and public conveyances had used it for business purposes in all respects as a highway, it might in an action of this kind, between a person using it in the way of business, as it had so long been used, and one who was charged with obstructing it, be found to be a public highway. *Held*, also, that the beam was the proximate cause of the injury, not the ice and snow only, and that defendants were liable, though the person who allowed the rubbish to thus accumulate might be liable also. *Held*, also, that there was no contributory negligence on the part of the plaintiff.

STATEMENT of claim.

2. The defendants wrongfully placed a beam at the height of 9½ feet only from the ground, and a gate to be hung thereon, across a lane or street called Clarence Street, running north from Wellington Street, parallel to York Street, in Toronto, and open to the public, and immediately in rear of the defendants' place of business, and also permitted ice and snow to remain for an unreasonable time under the beam and around the bottom of the gate, to such an extent as seriously to obstruct and prevent the free use of such passage along the said lane or street.

3. On the 27th of March, 1884, the plaintiff, while lawfully driving along the lane or street for the purpose of

delivering goods in his customary way to the Universal Knitting Machine Company, carrying on business on the premises adjoining the lane or street a little to the north of the defendants' place of business, in a careful manner, and without any negligence on his part, sustained serious and permanent bodily injury by being crushed between the said beam and the load upon which he was driving.

4. The plaintiff could not deliver goods to the said Knitting Company in any other way than by driving along the said lane or street, and past the rear of the defendants' place of business, and through the said gateway, and under the said beam.

5. The plaintiff was injured.

Statement of defence.

2. The defendants deny the above allegations of the statement of claim.

3. To the second paragraph of the statement of claim the defendants say that the lane or street called Clarence Street is a lane or street which terminates at a fence or gateway at the north boundary thereof, and the land on which the gateway and fence are erected is owned and used by the defendants to divide and shut off the land and premises on the north side of the fence and gateway from Clarence Street, and the said gate is closed every day, and is not open to the public, and the plaintiff was not at liberty as of right to pass over and through the gateway.

4. In answer to the fourth paragraph of the statement of claim, the defendants say that the entrance to the said Knitting Company's premises, and for the purpose of delivering goods and having access thereto, is from York Street, and not through Clarence Street as alleged, and if the plaintiff had gone over and through the proper entrance to the premises of the said Knitting Company no accident would have happened to him.

5. Any injury that happened to the plaintiff was caused by his own want of care and caution, which contributed to the accident.

Issue.

The action was tried at the last Winter Assizes, held at Toronto, before Cameron, C. J., and a jury.

The evidence shewed the defendants had erected a platform across the north end of Clarence street, from the rear of their premises fronting on York street to their premises on the west side of Clarence street, so as to communicate by that overhead passage with their premises on each side of the street, that platform being twelve or thirteen feet high. Then there was a fence along the north end of Clarence street, and a gateway in it, but which gateway was closed at night. The under side of the beam overhead at the gateway to the sill was eleven feet four inches; the beam supported the gate. It was a rolling gate. There was a lane twenty feet wide which ran to the north of the gateway up to another lane fifteen feet wide in rear of the Revere House, which turned east on to York street.

The usual approach to the knitting factory was by Clarence street; then through the gateway at the head of it, and then north along the lane, and out by York street.

It appeared there was an obstruction of Clarence street at the south line of the defendants' property—it consisted of a fence and a gate—and a fence and a gate at the north limit of the defendants' premises as well.

The plaintiff's evidence was:

"I was injured while driving to the knitting factory by the beam overhead. Before that I had been constantly in the habit of driving up there, and was never prevented. On the morning of the 27th of March last I had a heavy load on—had to make a delivery at the knitting factory. I saw the gateway was rather narrow. I took great care in passing through to prevent injury to the goods. The first gateway is narrower than the north one. The northern one requires more care in passing through it than the south one. I got through the south gate safely. I did not notice anything near my head—my attention was given to my horses. I was just then raised up a little and got a blow at the back of the head, or about the shoulders just at the back of the neck. I held on to my horses. The blow crushed me down, so that I was crushed right through the box I was sitting on—right through it. As I felt the box giving way I had just sense enough left to cry 'whoa' to my horses, and they stopped. That is all I remember. I was taken off the load and put in the ambulance."

Cross-examination:

"I knew the beam was overhead. I got my horses through the north gate. Can't say I had got the front wheels through too. I was sitting over the front wheels. My fore wheels just then struck some-

thing, don't know what, but to the best of my knowledge it was snow, ice, and dirt they struck, and whatever I struck raised the front wheels up. I did not get caught at any previous time." [It was stated the south gate was 11 feet 6 inches wide, and the north gate 9 feet 7 inches.] "The width of the lorry is 6 feet and the load over-lapped 6 inches on each side. There was difficulty to get through at the north gate. Clarence street is an ordinary road. The knitting factory has an entrance from York street, there is a gate on that entrance. My load that morning was about 6 feet high. If I had seen the beam that morning I would have got down off my load to save myself. But for the back up of the wheels I would have got through all right. The gates are always open as far as I know. The north gate is not in a line with the south gate; you have to make an angle from the south gate."

Charles Boeckh, a defendant, said :

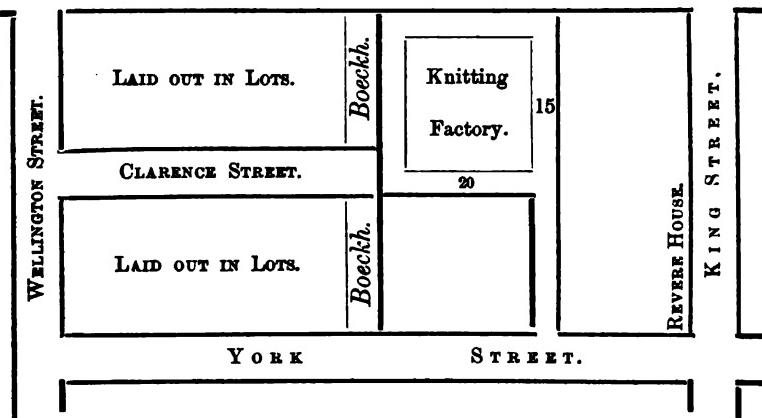
"I have carried on business on York street since 1874. I had a gate across at Clarence street, and teams could not pass from Clarence street or the lane to York street, unless I opened the gate. I put up the gate in 1878 when I built west of Clarence street. I put in gates so that everybody could not pass. The level of the lane north of Clarence street is higher than Clarence street. I think it was made so by the rubbish put there by the Knitting Company when they built lately. I put the gate up for people who have business there to pass from York street to Wellington street, and the reverse way, too. The gate is always open in the day time, except on Sunday. Shedd & Co., for whom the plaintiff was teaming, brought goods to us, and to the Knitting Company, and the Corset Company. I acknowledge the right of the corporation to tell me to take the way I have laid over Clarence street from my front to my rear building, because Clarence lane is a public highway. The gate is on Mr. Macpherson's ground, and I will take it away if he says so."

The questions put to the jury and their answers thereto were the following :

Q. Was the place where the gate beam was placed, which is alleged to have caused the injury to the plaintiff, a public highway, or on a lane for the use of the persons occupying premises thereon or connected therewith only ? A. On a lane for the public. Q. Was the beam the direct or only the indirect cause of the accident ? A. Direct. Q. Did the plaintiff receive the injury through any neglect or misconduct on the part of the defendants ; and if by neglect or improper conduct, state what, in your opinion, the neglect or misconduct was; or did he receive the injury through want of care on his own part; or was it an unavoidable accident for which no one was to blame ? A. The defendants were to blame for not having the beam high enough. [And they added in Court]. There was no want of care on the plaintiff's part. Q. Was the gate a properly constructed gate to be put in the place where it was ? A. No. Q. What damages is the plaintiff entitled to, assuming he has a right to recover in this action ? A. Two hundred and fifty dollars.

Upon these findings judgment was given for the plaintiff for the said damages, with costs.

The following sketch shews the locality :



At the last Hilary Sittings *Tilt*, Q. C., obtained an order nisi, calling upon the plaintiff to show cause why the verdict and judgment for the plaintiff should not be set aside, and a verdict and judgment be entered for the defendants, or a nonsuit, on the grounds :

1. That there was no actionable negligence shown on the part of the defendants.
2. That the alleged negligence of the defendants was not the proximate cause of the injury.
3. That the immediate cause of the accident was the accumulation of ice and snow on the property to the north of the defendants, and not owned by the defendants, and for the condition of which the defendants were not responsible.
4. That the plaintiff received the injury complained of through his own carelessness, and that he was guilty of contributory negligence.
5. That the lane on which the obstruction was, which caused the accident, was a private lane not open to the public.

Or why a new trial should not be had, on the ground that the verdict was contrary to law and evidence, and the

weight of evidence, for the reasons aforesaid, and to the learned Judge's charge.

Robinson, Q. C., and *Tilt*, Q. C., supported the motion. Clarence street is not properly a street; it is a lane. In any case it is not a public street or highway which the municipality is bound to keep in repair, nor has the city adopted it by by-law. The defendants did not invite the plaintiff to use the street or lane, nor request him to do so. The plaintiff was there at the time of the accident on the business and at the request of the knitting company. The beam complained of was where it is now before the land was laid out as a lane. The cause of the injury was the accumulation of sand and rubbish in the lane north of Clarence street, and was not on the defendants' land nor on Clarence street, where the gate was, or over which the beam was. The accumulation of rubbish raised the wheels of the lorry, and but for that there would have been no injury. They referred to *Sutherland on Damages*, vol i. 23; *Marble v. City of Worcester*, 4 Gray, 395; *Toms v. Corporation of Whitby*, 35 U. C. R. 195; *In re Morton and St. Thomas*, 6 A. R. 323; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Denny v. Montreal Telegraph Co.*, 42 U. C. R. 577; *Corby v. Hill*, 4 C. B. N. S. 556; *Shearman and Redfield on Negligence*, sec. 10; *Wharton on Negligence*, secs. 125, 824; *Hamsell v. Smyth*, 7 C. B. N. S. 731; *Bolch v. Smith*, 7 H. & N. 736; *Gale on Easements*, 5th ed., 470; *Addison on Torts*, 5th ed., 285; *Gallagher v. Humphreys*, 10 W. R. 664; *McFarlane v. Gilmour*, 5 O. R. 302.

McCarthy, Q.C., and *Morris*, shewed cause. The Chief Justice at the trial thought Clarence street was a public highway, but the lane to the north of it was not. The jury found the lane was public. It was admitted the plaintiff was lawfully on Clarence street. The beam complained of was in fact over the lane. All parties requiring to use these ways used both Clarence street and the lanes from there on to York street as a continuous way. There was no way or lane round the limits of the knitting fac-

tory's own land or yard room. It makes no difference that the plaintiff at the time was not on the street or lane at the defendants' request, or on their business ; it is sufficient that he was there on the business of the knitting factory, who had the use of the street and lane. If the lane be not a highway, yet if it is allowed to be used as a way for the general purposes of those requiring to use it, and it must be left in such a state so as not to be dangerous to those who are called upon to use it. The fact of the lane being used in connection with Clarence street, which is a highway, is some evidence that the lane is also a highway, as part of the thoroughfare. The owner of the soil forming Clarence street dedicated it to the public, for there was no reservation of any right in or to it made when it was laid out. The defendants obstructed Clarence street by their south fence and gate as well as by their north fence and gate. The relative position of the two gates towards each other, and their being so close together, helped to bring about the accident, for they withdrew the plaintiff's attention from the whole difficulties before him as he approached the north gate—the rubbish in his way on passing through the north gate.

They referred to *North London R. Co. v. St. Mary's Vestry, Islington*, 21 W. R. 226 ; *Belford v. Haynes*, 7 U. C. R. 464 ; *Regina v. Burney*, 31 L. T. N. S. 828 ; *Regina v. Spencer*, 11 U. C. R. 31 ; *Addison on Torts*, 5th ed., 285 ; *Corby v. Hill*, 4 C. B. N. S. 456 ; *Johnston v. Boyle*, 8 U. C. R. 142 ; *Regina v. Boulton*, 15 U. C. R. 272 ; *Glen's Law of Highways*, 189 ; *Smith's Law of Negligence*, 84.

Robinson in reply :

The beam, if wrongfully where it was, was only so as against those who were, in respect of property, interested in the lane, but not so as against the plaintiff. The action should properly, if maintainable at all, have been brought against the proprietors of the knitting factory, who were the persons who invited the plaintiff to their premises at

the time of the accident, and upon whose business the plaintiff was then engaged. Clarence street was not a public highway as contended for by the plaintiff's counsel: *In re Morton and St. Thomas*, 6 A. R. 323; *Regina v. Rubidge*, 25 U. C. R. 299.

March 7, 1885. WILSON, C. J.—It may be that Clarence street, being only twenty-nine feet in width, is not to be considered a public highway in the sense that the city has adopted it, so as to be bound to keep it in repair. It does not appear the city council has ever adopted it as a public road by doing work upon it or otherwise, and it has certainly not been adopted by by-law.

If Clarence street were laid out by the owner before the Municipal Act of 1873 was passed, and no doubt it was, the owner of the land was not before that Act prohibited from laying it out as a road or lane of any particular width. The C. S. U. C. ch. 54, sec. 399, prohibited the council from laying out any road or lane more than 90 or less than 30 feet in width, but where any road was altered it might be made the same width as formerly, and that seems to have remained the case until the Act of 1873, sec. 423.

The council, however, although prohibited by its own authority from laying out a road or street of less than 66 feet in width, may consent that the owner of land shall lay out a highway or street less in width than 66 feet. That was first enacted in 1873, and has been continued since then: 46 Vic. c. 18, sec. 545. And as Clarence street has been laid out and used as a public street for so many years, and there are several large business establishments having a frontage upon it, or a rear access to it, and as public conveyances use it for business purposes in all respects as a highway, it may not improperly, in an action of this kind, between a person using it in the way of business as it has so long been used, and one who is charged with obstructing it, be found to be a public highway or street.

But however that may be, it is quite clear that Clarence street has been used for business purposes by all persons requiring to use it as a way open, and intended for use, as it had been, without question, as an ordinary public street. And it is admitted by the defendants, in the evidence of the defendant above referred to, that they have received articles of their trade not only by that street, but by Sheden & Co.'s teams, one of which teams the plaintiff was driving when he met with the accident. The case of *Gallagher v. Humphreys*, 10 W. R. 664, referred to on the argument, is one among many cases of the like kind which applies here. The defendant, in his evidence, said he did not put up the gateway to obstruct the use of the street or lane, but for the benefit of those persons who had business shops and factories along that street, and to the north of it along the lane running from Clarence street. He admitted they, the defendants, had put up the gate at the north of that street of their own motion, and without the authority of any one either asked or given; and it appears the beam on which the rollers upon which the gate is moved back and forward, and the gate itself, are built upon and over the lane, close to the line of the lane with Clarence street.

It is not in dispute, therefore, that this road was used and was and is designed to be used by all persons doing business with those who have a local interest on Clarence street and the lane in connection with it, by teams or otherwise, and that those persons who so use the street and lane are expected and invited by those so interested locally in these premises to use the street and lane for such purpose. Nor is it in dispute that the defendants did not erect their gate upon the street or lane with the intent of prohibiting or obstructing the full and perfect use of the street or lane, but as a benefit and protection to those having their business places against stragglers and others who might be loitering about there after night-fall. Nor is it in dispute that the defendants had no right to put up these gates or the beams overhead.

What the defendants did do was, to put up a fence across Clarence street, with a gate in that fence, the gateway being eleven feet seven inches in width; that fence and gate being several feet, (the exact distance, I think, was not mentioned) but probably about twenty-seven feet south of the north line of Clarence street, as that distance of twenty-seven feet is the southerly limit of their lot, the rear of which is upon Clarence street; and also to put up and maintain a fence along the north limit of that street, and to hang a gate there nine feet six inches in width, running upon the beam overhead as before-mentioned.

These two gates are not directly opposite to each other; so that a team in passing through the north gateway has to go in a slanting direction from the first gateway to the second gateway, and then in that slanting direction it has to pass through a space of nine and a half feet.

The length of the lorry was twelve feet; the length of the tongue the plaintiff did not state. I may not be far wrong when I say about nine feet; and the horses' heads were just on a line with the end of the tongue. The width of the lorry was six feet, and the load upon it at the time overlapped six inches on each side, so that the horses and lorry were say twenty-one feet in length by seven feet in width.

The plaintiff said he had passed along there with loads often before, and he knew the place well, and he knew of the beam being overhead at the north gate where he was injured at the time in question; but at that time, as he had a large load on, and a narrow gateway, nine and a half feet, to pass through with his lorry, of the length and width before mentioned, in a slanting direction, all his attention was given to his way ahead of him, and he did not think of or notice the beam overhead, and the front wheels came in contact with snow, ice and rubbish just about the line of the north gateway, and raised the front wheels of the lorry and brought his neck and shoulders into contact with the beam overhead, and crushed him down with great violence, and did him the injury complained of.

No doubt he was badly injured. He lost five weeks work while under the doctor's care; he afterwards got leave of absence from his employers and went to the old country for his health, and was gone six weeks, and he has been taken back into his old service; but he still suffers in his spine from the crushing and blow which he got.

I have disposed of some of the grounds of the order *nisi* granted to the defendants. There remain only the two grounds; firstly, that the accumulation of ice, snow and rubbish, by raising the lorry, was, as the defendants say, the cause of the injury sustained by the plaintiff, and not the beam over head against which the plaintiff was crushed; and secondly, that the plaintiff was contributory to his own negligence.

The accumulation of rubbish was no doubt one of the causes of the accident, and it is quite likely that an action might have been maintained against the persons who placed the rubbish there; but it does not follow that because an action might have been supported against such person, an action will not well lie against the defendants who put the beam there.

In *Burrows v. The March Gas and Coke Co.*, L. R. 5, Ex. 67, affirmed 7 Ex. 96, the plaintiff was injured by the explosion of gas, by means of the gas fitter's workman taking a lighted candle to examine the place of the escape of the gas. The action was brought against the defendants, who supplied the defective pipe. It was contended that the action should have been brought against the gas fitter. Kelly, C. B., said: "The plaintiff cannot be disentitled to recover against the defendants, because the joint negligence of the defendants with that of the gas fitter concurs to cause an injury. If a man sustain an injury from the separate negligence of two persons employed on his premises to do two separate things, as in this case, and the plaintiff has sustained an injury from the negligence of the gas fitter's servant on the one hand and of the gas company on the other, he can, in my opinion, maintain an action against both or either of the wrongdoers. Here

he has thought fit to sue the company, and on the facts proved their negligence is complete."

In *Ilridge v. Goodwin*, 5 C. & P. 190, the defendant's horse, which had been left without any one in charge on the street, backed into the plaintiff's window. The defendant was sued, although the horse backed by reason of a third person striking it. Both were to blame—and either of them could have been sued for it. In *Green v. Elmslie*, 1 Peake's N. P. 278, the vessel was driven by stress of weather on the coast and captured, and the proximate cause of the loss was held to be the capture.

It is admitted it is an exceedingly difficult matter to determine which one of several causes is to be considered justly as the proximate cause of a particular act.

Here there was a wrongful accumulation of rubbish below and a wrongful placing of a beam above, and the rubbish, no doubt, was the primary cause of the accident, for it raised the plaintiff up against the beam; but the immediate cause of the injury to the plaintiff was the pressure of his head and neck against the beam and the proximate cause of the plaintiff's injury; and the person who put the rubbish there was liable to the plaintiff as well. He and the defendants were both liable as wrong-doers, and it is of no consequence that the other person could have been made liable for the accident as well as the defendants. It is sufficient to determine that the action well lies against the defendants.

The other question is, whether the plaintiff contributed to his own injury.

I am of opinion he did not, excepting in so far that he was sitting on his load, and happened to be there when he was injured. It is true he knew of the beam overhead; but his attention was drawn away from the recollection of that at the time from the straitened and critical position the defendants had placed him in by their two gateways, and the improper position in which they were placed the one with respect to the other, not in a direct but in a slanting position, which compelled the

plaintiff to watch his course very closely to get through the confined space of nine and a half feet with a lorry seven feet wide, and with his lorry and horses twenty-one feet in length.

These are circumstances proper to be considered in a case of the kind, and more especially as the plaintiff had no reason to think he was to be caught as he was by a pile of rubbish, which reduced the space between the natural surface of the ground and the beam above.

There was, in my opinion, no contributory negligence, and there was and is a good cause of action against the defendants. The damages are exceedingly moderate, considering the serious injury which the plaintiff, a young man, has sustained.

The motion will be discharged, with costs.

O'CONNOR, J.—I concur with the learned Chief Justice as to the conclusion at which he has arrived. I think Clarence street is a public highway, though not used as or intended to be a thoroughfare, and that the defendant had no right to narrow or obstruct its free use by the public.

The narrowing of a passage to a gateway and the erection of a gate there was an obstruction.

The peculiar position of that gateway in relation to the other gateway at the extremity of the street opening into the lane, whereto the plaintiff was proceeding, made it difficult to drive a team drawing a large freight waggon, heavily laden, through into the lane, especially when the load, as in this case, was a bulky one.

The direction from the one gate to the other was oblique, and the space between was too short to give the driver a chance to bring his team and waggon "plumb" with the gateway at the end of the street before driving through; and this difficulty would probably so engross the teamster's attention that he might, not unreasonably, at the moment forget the beam over the gateway through which he was passing. Then, if the defendants had no right to obstruct the place where the other gate was, I

do not see that they had a right to place and maintain the beam in the position which it is said to have occupied over the gateway at the end of Clarence street. Whether the defendants were responsible for the ridge formed by an accumulation of snow, ice, and rubbish immediately at the latter gateway, or not, is of no great consequence, though I am inclined to think, under the circumstances, that they were responsible in so far as it contributed, if it did contribute, to produce the injury complained of.

The peculiar positions of the gateways relatively to each other, and probably their narrowness, the beam over the gateway at the end, and probably the ridge across or close to that gateway, were but elements which, combined, formed one single cause of the accident which produced the injury, and I think the defendants are responsible for that injury.

ARMOUR, J., concurred.

Order nisi discharged, with costs.

[COMMON PLEAS DIVISION.]

THE JOSEPH HALL MANUFACTURING COMPANY. V.
HAZLETT ET. AL.

Sale of goods—Property passing—Landlord and owner—Trade fixtures.

In July 1882, the plaintiff sold to U. & Co. certain water-wheels, under a written agreement whereby until the whole purchase money was paid, the title and property should not pass but merely the right of possession, which should be forfeited on default of payment, or on the goods being seized under distress or execution, &c., the sale being conditional and punctual payment being essential to it. The wheels were received by U. & Co., and were placed, but so as to be capable of being taken out by the removal of a few boards and expenditure of a few dollars, in a flume attached to a mill erected by them on land, with water privilege, occupied under a written agreement for a lease made with H., which provided that the lease should contain provisions for forfeiture in the event of bankruptcy or non-payment of rent, or of non-performance of covenants. A lease was drawn up but was never executed. In February, 1883, the sheriff under a *s. f. a.* goods, seized the chattel property but not the wheels. About the same time U. & Co. voluntarily gave up possession of the premises and delivered the key to H. In March, U. & Co.'s interest in, amongst other things, the wheels was sold to S., under proceedings to realize the amount of certain mechanics' liens. Subsequently the lease and all the property of U. & Co. became vested in the defendants, the Ontario Pulp Co. Default having been made by U. & Co. to the plaintiffs, they in January demanded the wheels, and, on defendants refusal to deliver them up, claiming them as their own, the plaintiffs brought this action to recover their value.

Held, that had the wheels belonged to U. & Co. they would now be defendants' property, for being trade fixtures, by the effect of the forfeiture or surrender of the term and change of possession, they would have become the landlord's property ; but that the wheels never ceased to be anything else but chattels, and the property in them never passed to U. & Co. ; and the plaintiff having demanded them before the surrender was therefore held entitled to recover their value.

THIS was an action tried before Galt, J., without a jury, on the 14th day of November, 1884, at Peterborough, when judgment was directed to be entered for the plaintiffs for \$1,014.00, with costs.

The plaintiffs claimed to be entitled as against the defendants to be paid the amount due to them for four 52 inch Leffill double turbine water wheels, or to have the wheels delivered to them, under the following circumstances.

The plaintiffs about the 5th July, 1882, sold the wheels in question to Usborne & Co., who were about carrying on the business of Pulp Manufacturers, under a written agree-

ment, by which it was provided the title and property in the wheels should not pass to the said Usborne & Co., until the whole price of the said wheels had been paid and merely the right of possession should pass, which right should be forfeited and the plaintiffs should be at liberty to take possession of the said wheels on default being made in the payments, or in the event of the said goods being seized under any distress for rent or under execution against Usborne & Co., or upon any attempt by them to sell or dispose of, or part with the actual possession, without the plaintiff's consent first had and obtained in writing, or upon any act of abandonment of the said wheels by the said Usborne & Co., the sale by the plaintiffs being conditional and punctual payment essential to it.

The said Usborne & Co., on the 9th June, 1882, entered into an agreement with the defendant Thomas George Hazlett, acting for himself and defendant Hall as trustees on behalf of the Dickson Estate, the owners of the land, whereby the said Hazlett agreed to lease to the said Usborne & Co., part of Block M in the village of Ashburnham, lying south-west of the railway track, and adjacent to the river, two acres of land, with water privilege formed by erecting a pier extending easterly down the stream a sufficient distance from the first pier of the dam from the Ashburnham side of the river, such pier to be the same width as the present pier, up to the height necessary for receiving the timber of the floor for the flume, and by building a flume between the said pier and the bank of the river. The said pier and flume to be erected by said Usborne & Co. at their own expense ; said Usborne & Co. to be entitled to use sufficient water for their pulp and paper factory which they are to erect on the said premises. The lease to be for the term of five years from 1st July, 1882, at a rental of \$3.00 per horse power, which power is to be ascertained as soon as the flume is erected from the tables of the manufacturer of the wheels to be used by the said Usborne & Co., and the rental so ascertained should be payable quarterly, in advance.

The agreement provided that the lease should contain a proviso for forfeiture of the term in the event of bankruptcy, non-payment of rent, or non-performance of covenants, and the other usual covenants.

A lease in accordance with the agreement was prepared, but never executed.

The wheels were delivered by plaintiffs to Usborne & Co., and were put by them in their proper place in the flume made to receive them on said premises.

On or about the 7th February, 1883, the sheriff of the county of Peterborough, within which county the village of Ashburnham is, under execution sold the chattel property of the said Usborne & Co. but not the said wheels.

About the same time Usborne & Co. gave the key of the premises to Hazlett and Hall, and voluntarily gave up possession to them.

On or about the 2nd March, 1883, the interest of the said Usborne & Co. in the erections made by them were sold to the defendant Scott under proceedings to realize certain mechanic's liens registered; and the defendant Scott entered into possession of the said interest and of the said wheels.

The said Usborne & Co., made default in the payments for the said wheels. There became due to the plaintiffs in respect of a note given by Usborne & Co., to them on the 8th December, 1882, the sum of \$343.42; on the 12th December, 1882, the further sum of \$341.42; and on the 23rd January 1883, the further sum of \$234.00.

The evidence established that the wheels were so placed in the flume as to be capable of being taken out by the removal of a few boards in the floor or in the side of the flume at an expense of from five to ten dollars: that in the month of January, 1883 the plaintiffs demanded from the defendants the wheels and were refused, the defendants Hazlett and Hall claiming them as their property.

The defendants set up by way of defence to the plaintiffs' claim, that the wheels were so annexed to the said land that they became part of the freehold: that by reason of

executions having issued against the goods and chattels of the said Usborne & Co., their right to the term agreed to be demised to the said Usborne had become forfeited, and the defendants Hazlett and Hall claimed the forfeiture of the same, and the said Usborne surrendered the term and delivered possession to them : that the defendant Scott by purchase at sheriff's sale acquired any interest the said Usborne had in the said premises, which interest subsequently became vested in the defendants, the Peterborough Pulp Company, who entered into possession of the premises under an agreement with the defendants Hazlett & Hall.

According to the evidence of the defendant Hazlett, he did not resume possession of the premises until the sale of Usborne's chattels, which was on the 14th February, 1883, and he assigned as a reason for not giving the wheels to the plaintiffs when demanded by them in January, that he was not then in possession of them.

The learned Judge at the trial found that the wheels in question were the property of the plaintiffs; that they were not the property of Usborne ; that they were trade fixtures, and the plaintiffs had a right to demand and remove them ; and he gave judgment in favour of the plaintiffs for the said sum of \$1,014.00.

During Michaelmas Sittings, *Osler, Q. C.*, moved on notice to set aside the above finding and judgment for the plaintiffs, and to enter judgment for the defendants on the law and evidence.

During the same sittings, December 2, 1884, *Osler, Q. C.*, supported the motion.

C. H. Ritchie, contra.

The arguments sufficiently appear from the judgments.

December 20, 1884. **CAMERON, C. J.**—Upon authority there would seem to be no doubt, under the facts established

in this case, that if the wheels in question had belonged to the tenant Usborne they would now be the property of the defendants Hazlett and Hall ; for, conceding them to have been trade fixtures, as they were found by the judgment of my brother Galt to have been, by the effect of the forfeiture or surrender of the term and change of possession they became the property of the landlord. The authorities referred to on both sides fully establish this.

The case of *Pugh v. Arton*, L. R. 8, Eq. 626, cited by Mr. Osler, is but one of a long chain of decisions which affirm it, but not more strongly than *Pronguey v. Gurney*, 37 U. C. R. 347, and *Re Brook, Ex p. Roberts*, 10 Ch. D. 100, cited by Mr. Ritchie.

The plaintiffs' right cannot be supported except upon the ground that as between them, the tenant and the landlord, the wheels never ceased to be anything but chattels, and the refusal of the defendants to allow the plaintiffs to take them amounted in effect to a wrongful conversion, though as matter of law that is not the form of action for the recovery of the value of fixtures. That it may be so supported would seem a proposition so just that there ought to be no doubt about it, but I am sorry to say that a consideration of the authorities under the maxim *quicquid plantatur solo cedit solo* does not by any means place it beyond doubt. There are several exceptions, and one is an exception in favour of trade fixtures, which the tenant may remove, provided he does so during the term of his tenancy or within a reasonable time thereafter, and this right of the tenant extends to his assignee.

In the *London and Westminster Loan and Discount Co., v. Drake*, 6 C. B. N. S. 798, cited by Mr. Ritchie, it was so held, and that a tenant after mortgaging the fixtures to a third party could not by a surrender of the term and taking a new lease derogate from his own grant and deprive his assignee of them.

This decision was approved, followed, and somewhat extended in the more recent case of *Saint v. Pilley*, L. R. 10 Ex. 137, wherein it was held that the purchaser of

certain trade fixtures sold at auction by the trustee in liquidation of the insolvent owner upon the terms that they should be cleared by the purchaser in two days, was entitled to maintain his claim to such fixtures in an interpleader issue between him and a person claiming under a new tenant of the premises. The purchaser was in treaty with the landlord for a new lease, and allowed the fixtures to remain on the premises with the consent of the trustee in liquidation. The negotiation fell through, and the trustee surrendered the premises to the landlord, who re-let them, the fixtures still remaining affixed. About a fortnight after the surrender the purchaser hearing of it applied to the landlord for the fixtures, and brought his action against the person then in possession of them, who interpled.

Cleasby, B., in giving judgment says, at p. 139 : "The real question between the parties is the title to these articles, and it is quite plain the surrender did not forfeit the right which the vendee of the property had acquired. The general maxim is laid down in Co. Litt. 338 b. 'Having regard to the parties to the surrender, the estate is absolutely drowned' * * But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance.' Therefore, though the term was surrendered, yet the plaintiff's right was not affected ; the defendant came into possession of the premises with chattels upon them, which were subject to the rights of a third person."

The position of the owner of the goods which the tenant has affixed to the demised premises cannot be less strong than that of the tenant's assignee. The demand of the wheels here was made in fact before the surrender of the term, and when that demand was made the defendant Hazlett, according to the evidence of the plaintiff's witness Kennedy, assumed dominion over them by claiming they belonged to him and his co-trustee, the defendant Hall, as the defendants still do by their defence.

I think, therefore, the finding of my brother Galt at the trial was right, and this motion must be dismissed, with costs.

As to the question of reasonable time for the removal of fixtures, *Moss v. James*, 38 L. T. N. S. 595, is a case that it would not be well to overlook, in which it was held that a sale of the fixtures between three and four weeks after the surrender was too late to give the vendee a title against the landlord. *Saint v. Pilley* however was approved of by Thesiger, L. J., in that case.

GALT and ROSE, JJ., concurred.

[COMMON PLEAS DIVISION]

GREEN V. PONTON.

Registration—Will—Omission to enter in abstract index—Search by assignor—Right to benefit of by assignee.

A will relating to certain land, though registered, was not entered on the abstract index, whereby the plaintiff claimed he was damaged in purchasing a mortgage on the land, the mortgagor having no title. The mortgage was first purchased by S., a solicitor, for himself, and the assignment of it made to the plaintiff, for whom he was accustomed to act, and to whom he afterwards sold. S. was not retained by plaintiff to search the title for him; it was not searched when he sold to the plaintiff; and the learned Judge before whom the case was tried held that he relied on the supposed title acquired by the mortgagor by possession.

Held that the plaintiff could not claim that he was damaged by defendant's omission; and that he could find no action on the search made by S.

THE plaintiff brought his action to recover from the defendant, the Registrar of the county of Hastings, certain damages which he alleged he had sustained by the failure of the defendant to enter in the abstract index of lot 12 in the 4th concession of the township of Rawdon, an abstract of the last will and testament of one John McCann.

The cause was tried before Galt, J., without a jury, at Belleville, at the Fall Assizes of 1884.

The evidence shewed that the will had been registered, but was not entered on the abstract index of the lot; and it was claimed that the plaintiff was damned by the omission to enter it. It appeared that one George A. Skinner, a Solicitor, purchased the mortgage for himself, and had the assignment made to the plaintiff, for whom he was accustomed to act, and to whom he afterwards sold. Skinner stated that before purchasing he searched the abstract index, but found no will registered, and in consequence passed the title. Skinner was not retained by the plaintiff to search the title for him, and it was not searched when Skinner sold to the plaintiff.

There was evidence given to shew that Skinner, when he purchased, had knowledge of the will, and that he purchased solely in the belief that Mrs. McCann, the mortgagor, had acquired a title by possession. The defendant also claimed that a trust deed made by John McCann, which Skinner had seen, and under which Laura McCann had only a life estate, shewed that she could not have any title.

The learned Judge dismissed the action, being of opinion Mr. Skinner had taken an assignment of the mortgage on account of the supposed title the mortgagor had acquired by possession under the Statute of Limitations.

During Michaelmas Sittings, *Osler, Q. C.*, moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

During the same sittings, November, 24, 1884, *Osler, Q. C.*, supported the motion. The evidence shews that if the will had been entered on the abstract index, the plaintiff would have seen that the mortgagor had not a possessory title, and therefore the plaintiff was clearly damned by the omission to enter it. Under sec. 38 of the Registry Act, R. S. O. ch. , there is a clear duty

imposed to enter wills on the abstract index, and therefore the plaintiff must be compensated for the loss he has sustained: *Harrison v. Brega*, 20 U. C. R. 324.

Dickson, Q. C., and *Ponton*, contra. The evidence shews that the absence of the will did not damnify the plaintiff, but that the assumed possessory title was relied on; but even if the will had been left out altogether, the mortgagor never had a possessory title. She never had that kind of possession which would give such a title. The trust deed also shewed that the mortgagor had no title. The will was registered on the alphabetical index, and if the plaintiff had searched that he would have seen it. The plaintiff had notice of the will. There was also no liability to the plaintiff. The only person to whom the defendant would be liable would be to the person making the search, and the evidence shews that Skinner was not retained to act for the plaintiff, nor to make a search for him, and no search was made when Skinner sold to the plaintiff. They referred to *Tiffany* on Registration, 63-4, 74; 90-1, 204; *Macnamara v. McLay*, 8 A. R. 319, 323; R. S. O. ch. 111, sec. 63; *Robson v. Carpenter*, 11 Gr. 293; *Graham v. Chalmers* 9 Gr. 239; *Wharton* on Negligence, sec. 134; *Commonwealth of Pennsylvania v. Harmer*, 1 Local Courts Gazette, 108; *Elliott v. McConell*, 21 Gr. 276; *McArthur v. McArthur*, 14 U. C. R. 544; *Villers v. Beaumont*, 1 Vern. 100; *Roberts v. Williams*, 4 Hare 129; *Re Hennessy*, 2 Dr. & W. 555; *Sheldon v. Cox*, 2 Eden 224; *Ontario Industrial Loan &c., Co. v. Lindsay*, 3 O. R. 66, 84; *McConaghay v. Denmark*, 4 S. C. R. 609.

December 20, 1884. CAMERON, C. J.—I am of opinion my learned Brother was quite right in the conclusion he came to. There is no doubt the defendant made a slip in not entering an abstract of the will in the abstract index, and would be liable to any one suffering damage in consequence of such omission. But it is quite impossible to say on the evidence that the plaintiff sustained any damage,

I think the evidence preponderates in favour of the view that Mr. Skinner had in fact knowledge of the will, and that he acted in making the purchase solely upon his belief that the mortgagor had acquired a title by possession.

There is this further objection to the plaintiff's right to complain of the defendant's neglect of duty. He did not retain Mr. Skinner to examine the title for him, and Mr. Skinner expressly declares that he bought the mortgage for himself, and thus justifies charging the plaintiff the amount due upon the mortgage for principal and interest, and not the amount for which he acquired the assignment from Leonard.

If Skinner had taken the assignment to himself and then assigned to the plaintiff at a subsequent period, the plaintiff could have no cause of action against the defendant. This was determined in the case cited by Mr. Ponton, of the *Commonwealth of Pennsylvania v. Harmer*, 1 Local Courts Gazette, 108, an American decision. I refer to it as the reasoning is applicable to the present case, and forcible enough to decide it against the plaintiff.

The Registrar is entitled to be paid by every person making a search, and the duty of keeping his books correctly is, while in one sense a public duty, for the benefit of those who make searches and pay fees for so doing; and liability for breach of such duty must be confined to those directly injured. Were it otherwise, when would the liability cease? If it is to be extended beyond the person making or on whose behalf the search is made, though the error was rectified immediately after the search, the liability would be most unjustly perpetuated, and I cannot more forcibly present the defendant's argument for exemption from responsibility to the plaintiff in the present case than by adopting the language of Judge Agnew in the American case referred to—the duty of the Recorder of Deeds in that case being similar to that of our Registrars. He said: "What is this duty? It is as the keeper of the record to make searches for deeds and mortgages, and other

recordable instruments, at the instance of those who may apply therefor and pay him, the fee which the law allows him for the performance of the duty. The duty is specific, to make it for him who asks for it and pays for it, and therefore has a right to the responsibility of the officer and to rely upon it. It is he who is deceived by the officer's false search, because he alone stands in privity with him, by demanding performance of the duty and making compensation for it. The emoluments of the office constitute the consideration for undertaking the responsibility. Who would accept the office and perform such duties involving such heavy liabilities if he were to be allowed no equivalent? The officer who makes a search stands, in reference to its correctness, in the attitude of an insurer, and his fee represents the premium. To make him responsible to every new purchaser without a fee would be as inequitable as to hold an insurer liable upon a new risk without a new premium."

In adopting this language in reference to this case it is not necessary to say what the effect of a Registrar giving a certificate of the registration respecting a particular lot would be upon his liability to a third person dealing with the person to whom the certificate was granted upon the faith of it, and suffering loss in consequence of an error therein. The plaintiff in this case most unequivocally shews that he neither retained Mr. Skinner to investigate the title nor to bring this suit, both of which proceedings, as far as he is concerned, were wholly unauthorized, and the conduct of Mr. Skinner is scarcely reconcilable with that strict propriety of professional conduct which should always be observed in the dealings between solicitor and client.

The motion must be dismissed, with costs.

GALT and ROSE, JJ., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. YOUNG.

Brewers.—License.

The defendant, a brewer licensed to manufacture ale, &c., at Palmerston, under a Dominion license, had a cellar or vault at Brantford, where he stored such ale, &c., and sold it in quantities not less than allowed to be sold by wholesale.

Held, that the sale was authorized under the Dominion license, and that a Provincial license was not required.

On November, 7, 1884, *Cattanach*, obtained an order *nisi* to quash a conviction of the applicant, one Samuel A. Young, made on 9th August, 1884, by the police magistrate of the city of Brantford, for selling liquor at the said city of Brantford, without a license under the Liquor License Act of Ontario.

On December 19, 1884, *Cattanach* supported the order *nisi*.

Delamere, contra.

January 15, 1885. ROSE, J.—The point counsel seek to raise is, as to the right of brewers, &c., licensed to manufacture under a Dominion license, and hence, by implication, licensed to sell the liquor manufactured, to sell by wholesale in places other than as named in the license.

The defendant is a brewer at Palmerston. He had a "cellar" or vault in Brantford, where he stored ale, porter &c., and from which he sold and delivered. The sales were in quantities not less than allowed to be sold by wholesale.

In *Regina v. Severn*, 2 S. C. R. 70, it was decided that brewers' license gives the power, by implication, to sell by wholesale, and that the Provincial Legislature could not require a brewer so licensed to take out any further license to enable him to sell by wholesale. I need not repeat the reasoning which is there given at length.

I do not find in the Statute 31 Vic. ch. 8, or in 46 Vic. ch. 15, D., or in the license, any restriction by the Dominion Parliament as to the places where the brewers are to sell

their liquors. The license is to brew in a certain brewery. This must be well described and the manufacture strictly confined to such brewery, for obvious reasons. No such reasons are apparent to support a contention that the sales must be made in such brewery. If sales can be made out of the building or off the premises, then what other territorial limit can be assigned? The storing of the goods of course cannot determine the place of sale. If restricted to the premises then it would not be possible to sell by travellers or agents. If the Dominion Legislature have not either expressly or by reasonable intendment limited the territory within which the goods may be sold, then by what power can the Provincial Legislature do so? What license is the brewer to take out so long as he sells by wholesale? Clearly not a shop license, which is for sale by retail. No power has been suggested which would warrant such an interference.

I cannot understand what license the defendant can be asked to take out, or what provision of law he has violated in selling by wholesale the ale, &c., brewed by himself under a Dominion license, and on which he has paid the excise duties. Any license duties he might pay to the Provincial Government would be an indirect tax which it is clear cannot be levied upon the liquor so manufactured by him.

He pays one government for the privilege of brewing, he cannot be compelled to pay another for the privilege of selling. That, as I understand it, is the decision in *Regina v. Severn*, 2 S. C. R. 70, and is not affected by *Regina v. Hodge*, 9 App. Cas. 107, and is confirmed by the late decision of the Supreme Court in the opinion given as to the power of the Dominion Parliament to legislate as to the wholesale liquor trade.

The conviction must be quashed.

[CHANCERY DIVISION.]

GRAHAM V. WILLIAMS.

Mechanics' lien—R. S. O. ch. 120—Tenant with right of purchase—Right of lien holder to charge the landlord's interest.

G. supplied bricks to W., who had leased certain land from H., with the right to purchase on certain terms. The contract for the supply of the bricks was made between G. and W., and in W.'s credit : although H. was aware that they were being supplied, and that a building was being erected on his property, and he had agreed to lend part of the money required for the building to W. on the security of the property. W. did not exercise his right of purchase, and G. filed his lien against both W. and H., and brought an action to charge the land.

Held, that the interest of H. in the land could not be charged.

THIS was an action brought by John Graham against Henry Williams and John Heney, to have a claim for certain bricks supplied by the plaintiff to Williams declared a lien upon certain land which was owned by Heney, but had been leased to Williams with a right of purchase if exercised within a certain specified time.

The action was tried at Ottawa, on December 3rd and 4th, 1884, before Boyd, C.

The evidence shewed that Heney had leased the land to Williams for a period of one year, with a right to purchase it for the sum of \$5,000 within that time : that the plaintiff had contracted with Williams alone for the bricks which were supplied : that Heney was aware they were being supplied ; and that the option to purchase had not been exercised, and it was not probable that it ever would be exercised.

O'Gara, Q.C., for the plaintiff. The evidence shews that it was a joint affair between Williams and Heney. Williams had no title upon which the expenditure for the bricks would attach. It might be regarded as Heney's enterprise alone. He is the owner, and he will ultimately get the whole benefit: R. S. O. ch. 120, sec. 2, subsec. 3—see also sec. 7; *Phillips* on Mechanics' Liens, 2nd ed., par. 70, 72.

Gormully for the defendant Heney. Heney's lease of the land to Williams for a year shews the conditions between them as to possession of the land. The term commenced May 1st, 1884, and the option to purchase was to be exercised before May 1st, 1885. Under sec. 2, subsec. 3, of R. S. O. ch. 120, the word "owner" must mean the person at whose request the work was done, which certainly is not the position that Heney occupies. As to leaseholds, see sec. 6, subsec. 2. Sec. 7 has no application to the state of facts here.

O'Gara, Q.C., in reply, cited *Broughton v. Smallpiece*, 25 Gr. 290.

December 1st 1884. BOYD, C.—This action is by the contractor against the owners of the property to have a lien declared under R. S. O. ch. 120. Bricks were supplied by the plaintiff under a contract with the defendant, Williams, who as a leasee of the property for one year from the other defendant, Heney, with an option or right to purchase during that period. This lease is dated 21st April, 1884, as the term is to begin from the 1st May, at a rent of \$2^c payable quarterly in August, November, February, and May. The condition of purchasing was that the price was to be \$5,000, of which \$1000 was to be paid by Williams on or before the 1st May, 1885, and the balance in eight early instalments.

It is not clear the evidence at what date the contract for the delivery of the brick was made between the plaintiff and Williams; when the first bricks were delivered, but both parties in their pleadings agree that the work of building was begun after the lease was executed. If the date in the file is correct, the bargain for bricks was made before lease was given. The relative position of the litigants thus: The plaintiff contracted with the tenant for supply of materials, and the owner of the fee afterward became aware of that fact. It is further proved that defendant Heney agreed to supply two-thirds of the money required for the building by way of loan to the tenant upon the security of the property.

The tenant has not yet exercised his option to buy, and it is most likely will not do so, as was indeed assumed on both sides. The building is not finished, but the plaintiff has filed his lien against both defendants, alleging therein as appears to be the fact, "that the bricks were furnished for the defendant Williams, and upon his credit." The defendant Heney knew of the arrangement for the supply of bricks made by his co-defendant, and that the bricks were being supplied by the plaintiff. There is no evidence which would justify a personal recovery against Heney; the question is, can there be a lien against his estate in the land?

By the Act R. S. O. ch. 120, sec. 2, sub-sec. 1, "contractor" means a person contracting with, or employed directly by, the owner for the furnishing of materials. That precisely fits the manner of dealing as between plaintiff and Williams' the former being employed directly by the latter: *Bank of Montreal v. Haffner*, 29 Gr. 319. By sub-sec. 3, "Owner" extends to a person having any interest, legal or equitable, in the lands upon which the materials are furnished, at whose request, and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit, any such materials are furnished. By sec. 6, sub-sec. 2, where the estate charged is leasehold the fee simple may also be subject to the charge, provided the owner consents in writing, as therein specified.

The plaintiff puts his case for relief against Heney on the ground, as pleaded in paragraph 5, that the plaintiff, at the request of Williams and "with the privity and consent of Heney," agreed to furnish and did furnish the bricks required for the building; and thus further puts it in paragraph 7, that the bricks were furnished at the request and upon the credit of the defendant Williams, but on the behalf of both the defendants, and with the privity and consent of Heney, and for the direct benefit of both defendants and each of them." The whole claim is thus rested upon the effect of subsec. 3, of sec. 2, of the Act as revised.

I find it difficult to give the Act such a construction a

would implicate the estate of Heney. Looking at the other citations I have given, the Act intends a dealing of some kind between the contractor and owner, resulting in a contract express or implied. The defendant Williams, as lessee with the right of purchase, fulfils all the conditions of the Act to give him the status of owner, and he is unquestionably the owner by whom the plaintiff, as contractor, is employed.

The Act further intends that when the owner is tenant something more is required than the landlord's quiescence or acquiescence while the building is being erected, in order to subject his land to the payment of his tenant's debts. In such a case the fee may be charged, but only when consent thereto is given in writing by the owner in fee. The plaintiff knowing the state of the title contracts with the tenant in possession who had the control of the land during his term. It was assumed by all that Williams would be able to carry out his purchase, and the landlord knowing what was being done approved of it, not in order to the creation of a lien against his estate, but because the expenditure was an assurance that his lessee would become in fact his vendee.

If you give a very latitudinarian interpretation to the definition of "owner" it is possible to read such a case as this into the Act, but I am against giving such a meaning to the words when the result is, to charge one man's land for another man's debt.

The defendant Williams was tenant of the land, and had the right to become owner. He had also the right to build upon and improve the land not necessarily dependent upon but sanctioned by an oral arrangement with Heney, based on his contemplated ownership. In such circumstances it cannot be said that the materials were furnished on behalf of Heney. As put in the lien filed they were "furnished for" Williams, and there was no agreement between Williams and Heney that Williams should build the house for Heney. The bricks were in one sense provided with the privity or consent of Heney, *i. e.*, he knew that the

work was going on, but there was no privity between him and the contractor, and without a consent in writing as subsequently provided in the Act, I do not think his knowledge would or should make his estate liable if it turned out that the tenant was not able to complete his purchase. Nor do I think that the work here done was "for his direct benefit." It might result in his getting the benefit of it if the tenant forfeited his right or option to acquire the fee, but it was not immediately and directly for his benefit when and as the brick was being supplied, and when the lien was filed.

If the Act said plainly that the estate of the owner in fee should be charged if he permitted or encouraged a tenant or a person having a right to purchase to build on the land, then the present case would be covered by such an enactment. But I cannot find this meaning, unless by isolating the words "privity or consent" in the second section in a manner which seems to me unwarranted by the context and general scope of the whole Act and its numerous amendments.

The Act contemplates a direct dealing between the contractor and the owner, and I suspect that the words touching privity and consent in the interpretation clause are referable to the relations existing between the owner and sub-contractors, and are not to be so expanded as to embrace the case of a proprietor who is cognizant of and encourages the improvement of the property by a person holding under him, who has yet such an estate in the land that he is the owner within the meaning of the Act as to the contractor whom he employs. The agreement to supply money by way of loan does not change the character of the transaction so as to place Williams in the position of a mere agent of Heney. A man owning land might agree with another for the erection of houses on the land, and then to sell him the land thereafter. All the materials procured by the contemplated vendee would be a charge upon the land, because his position as to the owner was really that of contractor, and those supplying materials

would be so doing on behalf of the owner, and with his privity and consent. But the agreement here is that of tenancy, with a right to purchase.

The arrangement as to Williams building on the land was, in truth, a subsequent affair, and the sanction of Heney was sought, not only to procure a loan, but also to guard against any increase of price arising from the additional buildings on the land in case the purchase was carried out.

The following cases are useful for reference on the points I have been discussing: *Gray v. Carleton*, 35 Maine 481; *Hilton v. Merrill*, 106 Mass. 528; *Hayes v. Fessenden*, *Ib.* 228; *Knapp v. Brown*, 45 N. Y. 207; *Rollin v. Cross*, *Ib.* 768; *Scales v. Griffin*, 2 Doug. (Mich.) 54; *Stuyvesant v. Browning*, 1 Jones & Spencer (N. Y. S. C.) 203; *Randall v. Garvey*, 10 Abb. P. R. 179; *Hallahan v. Herbert* 11 Abb. P. R. N. S. 326.

Unless the plaintiff chooses to accept the offer of Heney subordinating the lien to his claim as vendor, I will have to dismiss the action as against the defendant Heney. In any event, the plaintiff will have to pay Heney's costs, though I regret I cannot exempt him from this penalty incurred in endeavouring to discover the true meaning of the Mechanics' Lien Law.

G. A. B.

NOTE.—This case has been affirmed on appeal before the Divisional Court. See C. L. J. June 15, 1885, and *infra*.

[CHANCERY DIVISION.]

RE KERR, KERR ET AL. v. KERR ET AL.

Will—Executors to value estate—Certain beneficiaries consulted to exclusion of others—Exercise of quasi judicial functions by executors.

A testator provided in his will that on the death of his widow, his executors should have his farm valued, and gave permission to his son E. to take it at their valuation, after which the proceeds were to be divided amongst all his children, of whom the executors were two. E having made up his mind to take the farm, the executors called in his aid in nominating three valuers, and proceeded to value the farm, he being present, without notifying the other children. There was no evidence that he had attempted to influence the valuers or that they had reached their conclusion in other than a legitimate and upright way, but certain of the children had impeached the valuation as being too low and asked for administration :

Held, that the executors who were exercising, in some sense, judicial functions, should either have excluded all interested, or should have invited all interested to take part in appointing valuers : that there should therefore be another valuation of the farm, and if the parties desired, it might be referred to the Master, or the executors might, on notice to all interested, proceed to do what was needful in that behalf.

THIS was an action brought by John Kerr and Jane Grieves against William Kerr, George Kerr, and Edward Kerr, claiming administration of the estate of their late father James Kerr.

The statement of claim set up that the testator, the said James Kerr, by his will, appointed his sons, the defendants William Kerr and George Kerr, together with their mother, who was since deceased, executors and trustees of his will; and after making provision for his wife declared the trusts on which his said trustees should hold the residue of his property, as follows :—"I also desire that whatever real and personal property may be left at the time of the decease of Margaret Kerr, my wife, that these my executors have the same valued, and after such valuation first to allow Edward Kerr, my second son, \$400 out of this my property, and the balance to be equally divided amongst all my sons and daughters then living ; and should any of my sons and daughters die before their mother, leaving issue, then their portion to be equally divided amongst their children then living. And should

Edward Kerr, my son, think proper to keep the farm and pay what legacies are or will be against the same besides his own share when the balance as above is divided, then these my executors shall give him two years to pay the same in equal instalments to each :" that the said Edward Kerr, who was a defendant to this action, had ever since his mother's death being in possession of the farm in question : that they, the plaintiffs, were entitled to their respective shares in the testator's estate : that the defendants pretended that some time after the death of Margaret Kerr, the executors did have the farm valued pursuant to the will, and it was valued at \$4,850, and Edward Kerr elected to keep it: that Edward Kerr accordingly claimed to be entitled to the farm absolutely upon the payment by him of \$4,850, and the executors supported his claim, and asserted that they were only bound to account to the beneficiaries under the will for the sum of \$4,850: that if any such valuation was ever made it was made without notice to them, the plaintiffs, and without any knowledge thereof on their part, and \$4,850 was an inadequate price for the farm, which was worth at least \$1,650 more.

The plaintiffs accordingly charged that no *bond fide* valuation of the farm, pursuant to the will, had ever been made, and Edward Kerr was not entitled to claim it, as he did do, nor were the executors liable to account for \$4,850, only: that notwithstanding their, the plaintiffs', protests, the defendants still insisted that the claims and pretences above set out were true in fact. And the plaintiffs claimed that the real and personal estate and effects of the testator might be administered under the direction of the Court and for further relief.

The defence was, that the farm had been fairly and properly valued pursuant to the will.

The rest of the facts of the case sufficiently appear from the judgment.

The action was tried at Peterborough, on November 27th and 28th, 1884, before Boyd, C.

W. Cassels, Q. C., and H. B. Weller for the plaintiffs. The executors were bound to give John notice before making the valuation, because they took Edward into their confidence. John was hostile to the estate, and had threatened legal proceedings before, and therefore the two executors did not represent his interest.

C. Moss, Q. C., and D. W. Dumble, for the defendants. The executors were not bound to consult any of the beneficiaries. Their own interests were adverse to those of Edward. Both sides were thus represented. Edward was against all, and the executors were in the same interest as the other beneficiaries.

December 17th, 1884. *BOYD, C.*—Lord Langdale's exposition of what he terms "one of the first principles of justice" is, to a considerable extent, applicable to the circumstances of this case. In *Harvey v. Shelton*, 7 Beav. at p. 462, he says: "In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the judge, which means are not known to the other side."

By the terms of the will in this case the executors were directed to have the property valued at the death of the testator's widow, and then permission was given to his son Edward to take the farm at that valuation, after which the proceeds were to be distributed among the sons and daughters.

This matter of valuation was not an arbitration, but it was a duty devolved upon the executors which it became them to discharge with the most perfect fairness and impartiality. They might, without consulting any one interested, have called upon men of judgment and experience, acquainted with the value of land in that neighborhood, upon whom they could depend, and have made use

of their opinions in arriving at the required valuation. This course if *bond fide* pursued would probably not have been impeached, and it would, in my opinion, have been unimpeachable. But they with probably the most honest intentions adopted another course. They asked (a) the son Edward, who had made up his mind to keep the farm (see his defence, paragraph 1) to aid them in nominating three valuers. According to the executor George, it was Edward who suggested the names of these men. According to Edward he and George went to see the three about valuing the land, and he and George agreed that they would be good men. According to the executor William, he and his co-executor discussed the question as to who would be capable honest men to value the land in the presence of Edward. He says further, that the names of the valuers were suggested among these three at that discussion (*i.e.* the two executors and the son Edward.) But while Edward was there and assisted in, if he did not suggest, the choice of these men, none of the other distributees were notified of what was going on or asked to be present. This is the more noticeable, because the one who is now plaintiff was at the homestead on the occasion of the mother's funeral during Saturday and Sunday, and the choice was made on Monday; moreover, as to this plaintiff the executors were aware that he was previously dissatisfied with the management of affairs, and had threatened law.

It further appears that George and Edward Kerr together visited all three valuers separately, and asked them to act, and the valuers met Edward on the place while they were engaged in going over the premises in order to fix the value. It appears that Edward had built a barn on the place, and made other improvements on it since his father's death, and that the valuers, or some of them, knew this from their being intimate with Edward, and living in the neighbourhood for many years.

(a) Paragraph 1 of Edward Kerr's defence, was as follows: "That, having elected to keep the farm in question, it was valued by disinterested and capable valiators, and that he accepted the farm at the valuation fixed upon it, namely, \$4,750."

There was no evidence that Edward had endeavoured to influence the valuers, or that they had arrived at their conclusion in any other than a legitimate and upright way. Still, upon the whole evidence, I thought their value was a low one, though by no means such as would call for the interference of the Court on that ground. In short, I absolve all the parties and the valuers from any intentional wrongdoing. Nevertheless, the manner of appointing them was so obviously onesided as to amount to what Knight Bruce, V. C., once designated as a material irregularity: *Hamilton v. Bankin*, 15 Jur. 70.

These three farmers who were called in were requested to exercise in some sense judicial functions, and it would be contrary to first principles to let the one who was to purchase suggest or point out his own nominees to fix the value, without notice to those interested in getting the best price. Nor do I think that this apparent unfairness and one-sidedness was any the less real because the executors were some of those who were to share in the proceeds of the sale. There was antagonism between the plaintiff John Kerr and the executors in regard to matters connected with the estate, and the plaintiff should not be bound because the executors assumed to act on his behalf. In other words, my opinion is, that the executors should either have excluded all interested, or should have invited all interested to take part in appointing valuers. My conclusion is, that there should be another valuation of the farm in question; if the parties desire, it may be referred to the Master for that purpose, or the executors may, upon notice to all interested, proceed to do what is needful in that behalf. Costs of action will be reserved till the further result is ascertained.

A. H. F. L.

[CHANCERY DIVISION.]

RE FOX

AND

THE SOUTH HALF OF LOT NO. ONE IN THE TENTH
CONCESSION OF DOWNIE.

Quieting title—Devise—Condition—Power of sale.

The petitioner in a quieting title application claimed title as devisee under a will which contained the following provisions :

“Secondly. I devise to my son J. F. [the land in question], but he is to be known as a sober, steady, and industrious man.
“Thirdly. If at any time during the period of five years after my death, it appears to my executors, hereinafter named, that my said son J. does not remain sober, I give them power to sell and dispose of the said property for such charitable purposes as to them shall seem meet.”

Held, that the power of sale in the will was not void for uncertainty, and that the certificate of title could only issue subject to such power.

THIS was a petition, filed by James Fox, to quiet the title to the south half of Lot No. 1 in the 10th concession of the township of Downie, in the county of Perth.

The petitioner claimed title under the will of his mother, Ann Fox, dated March 4th, 1884, which contained these provisions :

“Secondly. I devise to my son, James Fox, the south half of Lot. No. 1 in the 10th concession of the township of Downie, in the county of Perth, containing fifty acres more or less, but he is to be known as a sober, steady and industrious man. Thirdly. If at any time during the period of five years after my death it appears to my executors, hereinafter named, that my said son James does not remain sober, I give them power to sell and dispose of the said property for such charitable purposes as to them shall seem meet.”

Executors were appointed in the will, and Ann Fox died April 30th, 1884.

The petition originally came before the Referee of Titles, at Stratford, on September 12th, 1884, who certified that the petitioner was entitled to a certificate of title as

prayed, subject to two certain mortgages, and "also subject to the terms of the last will and testament of Ann Fox, deceased."

On the matter subsequently coming before the Inspector of Titles, it was contended by counsel for the petitioner that the title of the petitioner should be certified to be free from the terms of the will of Ann Fox, and after hearing argument he gave the following judgment:

November 19th, 1884. MR. HOLMESTED.—I am of opinion, after examining the cases referred to by the learned counsel for the petitioner, that the power of sale contained in the will is good, and that the title of the petitioner must be certified to be subject thereto.

In addition to the cases cited I have referred to, among others, *Maundrell v. Maundrell*, 10 Ves. 246; *Duddy v. Gresham*, 39 L. T., N. S. 48; *Duke on Charitable Uses*, 134; *Anderson v. Dougall*, 13 Gr., 164; *West v. Birney*, 1 Russ. & M., 431.

The case of *Re Rosher—Rosher v. Rosher*, 26 Ch. D. 801, I may observe is in conflict with *Earls v. McAlpine*, 6 A. R., 145, and *Re Winstanley*, 6 O. R., 315, the latter cases of course being binding upon me.

From this judgment the petitioner appealed, and the appeal was argued on November 25th, 1884, before Proudfoot, J.

W. H. P. Clement, for the appeal.

December 1st, 1884. PROUDFOOT, J.—I have read the opinion of the Inspector of Titles, and agree in his conclusion that the power of sale is good, and that the title of the petitioner must be certified to be subject thereto.

The condition is not more uncertain than that in *Pew v. Lefferty*, 16 Gr., 408. That was the case of a bequest of money, "provided he continues a steady boy, and remains in some respectable family until he is of age," with a gift over to a daughter on breach of the condition.

Here the condition is, that the devisee is to be known as "a sober, steady and industrious man," with a gift over in case the devisee does not remain sober.

There is no greater difficulty in determining what is a *sober man*, than a *steady boy*, and a *respectable family*.

From this judgment the petitioner appealed to the Divisional Court, and the appeal was argued on February 2nd, 1885, before Boyd, C., and Ferguson, J.

Clement, for the appeal. The petitioner claims title through the will of his mother, Ann Fox. It has been decided that his certificate of title under the Quieting Titles Act R. S. O. c. 110, should issue subject to the power of sale to the executors in the will. This is wrong, because the condition upon which the power of sale is to be exercised is void for uncertainty: *Pew v. Lefferty*, 16 Gr. 408; *Fillingham v. Bromley*, 1 Turn. & Russ. 530; *Jones v. The Earl of Suffolk*, 1 Bro. C. C. 527; *Clavering v. Ellison*, 7 H. L. Cas. 707; *Re Lot*, 27, 18th Con. of E. Williams; *Hamilton v. McKellar*, 26 Gr. 110.

March 21, 1885. BOYD, C.—The general rule is, that a gift over will cause a condition subsequent to take effect unless it be illegal or impossible, or so vague as to be insensible.

We find in this case what is tantamount to a gift over in the third clause of the will, which is in these words: [The learned Judge here read the third clause of the will as above set out.]

The Court will intend, if default is made in the observance of the condition, that the proceeds of the realty will, be applied to such charitable purposes as will not be obnoxious to, or as are exempted from, the Statute of Mortmain.

There is no such uncertainty in the condition that the devisee is "to remain sober" for five years as disables the executors or the judges from gauging its fulfilment.

It would be unfortunate if the Court was obliged to interpose difficulties in giving effect to the intentions of testators so obviously framed for the well-being, and well-doing, of the objects of their bounty, and especially so when these objects are their own children. The case of *Pew v. Lefferty*, 16 Gr. 408, and also that of *Tattersall v. Howell*, 2 Mer. 26, vindicate the law from being so unreasonable,

The judgment should be affirmed.

FERGUSON, J.—The devise is to James Fox. It is immediately followed by the words "but he is to be known as a sober, steady, and industrious man." The gift over is that, if at any time during the period of five years after the death of the testator, it should appear to the executors that he, James Fox, did not "remain sober," they should have the power to sell and dispose of the property for such charitable purposes as to them should seem meet.

It was not contended that there are no charitable purposes for which the property might lawfully be sold. The sole contention was, that the condition of the gift to James Fox was a condition subsequent, and that it was void for uncertainty. I think the cases *Tattersall v. Howell*, 2 Mer. 27, and *Pew v. Lefferty*, 16 Gr. 408 indicate very clearly that the condition should not be considered uncertain; and apart from authority I cannot perceive the uncertainty contended for. I am of the opinion that whether it is to be looked at as a condition precedent, or a condition subsequent, it cannot be considered void for uncertainty; and I think the judgment should be affirmed.

G. A. B.

[CHANCERY DIVISION.]

BRIDGES V. THE REAL ESTATE LOAN AND DEBENTURE COMPANY.

Lands improperly included in first mortgage—Action by second mortgagee against assignee for value without notice of first mortgage—Defence—Registry Act, R. S. O. ch. 95 sec. 8.

Y. being the owner of certain land, mortgaged it with other lands to the M. P. B. Society by mortgage, dated July 12th, 1873, registered July 14th, 1873. Subsequently being desirous of selling part and paying off the mortgage and getting a new loan, he by an agreement in writing, arranged with the society to leave the mortgage standing, take a further loan of \$700, and have certain of the lands (of which the lot in question was part) released by the Society. A second mortgage for the \$700 advance was prepared and executed dated February 1st, 1875, registered February 11th, 1875, which by mistake as was alleged included all the lands in the first mortgage: and a release dated February 9th 1875, was duly executed by the Society releasing the lot in question from the operation of the mortgage of July 12th, 1873, and was afterwards registered March 20th, 1876.

B., the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question, which should have been omitted, loaned Y. certain moneys, and took a mortgage dated May 21 1877, registered June 6th, 1877, to secure the payment thereof. The Society assigned the second mortgage and all moneys secured thereby to the defendants by assignment dated March 1st, 1880, registered January 17th, 1881, and by deed dated March 1st, 1882, registered June 2nd, 1883, Y. conveyed his equity of redemption to B.

In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to B. It was held (affirming the judgment of Ferguson, J.). That the combined operation of R. S. O. c. 111, s. 81, and R. S. O. c. 95, s. 8, formed a complete defence, and for that the defendants as assignees of the mortgage for value, having the legal estate, might defend as a purchaser for value without notice, and claim also the protection of the Registry Act, as against the plaintiff a subsequent purchaser or mortgagee from the original mortgagor.

Sembler that even as against the mortgagor the defendants would also be entitled to prevail.

THIS was an action brought by George Bridges against the Real Estate Loan and Debenture Co., to obtain from the defendants a conveyance of a certain lot which had been included by mistake in a mortgage, of which the defendants were the assignees.

The plaintiff's statement of claim alleged that Henry C. Young, being the owner of the lot, had mortgaged it with other lands to the Metropolitan Permanent Building Society, by mortgage dated July 12th, 1873, and registered July 14th, 1873; that in the beginning of the year 1875,

the said Young, wishing to pay off the said mortgage, and to sell a portion of the lands covered by the same, and to obtain a new loan of larger amount, and the said society wishing to retain the investment, and being willing to advance more money, it was by an instrument in writing agreed between them that the principal secured by the mortgage should continue so invested, and that the said Young should accept an additional loan of \$700 upon the security of the lands comprised in the said mortgage, except certain lands which were to be released, and which included the land in question: that for the purpose of carrying out the said agreement, the said Young, by indenture dated February 1st, 1875, registered February 11th, 1875, mortgaged all the lands therein comprised to the society to secure the \$700, and a release was prepared and executed, dated February 9th, 1875, and registered March 20th, 1876, which released the lands in question from the operation of the first mortgage: that the mortgage of February 1st, 1875, by mistake, included the lands agreed to be released: that by indenture, dated May 21st, 1877, registered June 6th, 1877, the said Young mortgaged the land in question to the plaintiff, to secure certain moneys which were advanced by him: that by indenture, dated March 1st, 1880, registered January 17th, 1881, the said society assigned the said mortgage of February 1st, 1875, to the defendants: that by indenture, dated March 1st, 1882, registered June 2nd, 1883, the said Young conveyed his equity of redemption to the plaintiff: that the plaintiff was aware of the agreement between Young and the society, and advanced the money and took his mortgage upon the faith thereof, and believing that the land comprised in his mortgage was not mortgaged to the society, and did not become aware of the mistake until about the month of May, 1883, when he requested the defendants to execute a conveyance to him of the said land to correct the mistake, and they refused so to do.

The defendants, besides denying the existence and validity of the release, set up that they were assignees for

value without notice, and claimed the benefit of the registry laws.

The action was tried at the sittings held at Toronto, on November 15th, 1884, before Ferguson J.

George Bell, for the plaintiff.

A. C. Galt, for the defendants.

At the trial, the plaintiff's counsel offered in evidence certain letters that were received from the agent of the society, and copies of some that were sent to him, which were ruled out by the learned Judge, and the following judgment given :

November 15th, 1884. FERGUSON, J.—Mr. Bell, for the plaintiff, asks me to draw an inference from the facts disclosed by the mortgage and release, that the intention must have been that the land in question was not to be included in the second mortgage, and to put this in place of evidence which, it is admitted, should be, at least, equal to the evidence that would be necessary for the purpose of reforming the second mortgage, if the case were between the original parties to it. This, I think, I cannot do ; and although there may be a reasonable conjecture that the actual fact was as the plaintiff says, I can see no course but to dismiss the action, with costs.

Mr. Bell.—Would your lordship stay the proceedings until the sittings of the Divisional Court ?

FERGUSON, J.—No : that Act is misconstrued so generally. I have no doubt that you have failed in making out a case. I have doubt as to the actual fact ; but as a matter of trial, I have not any doubt whatever that you have failed to make out the case that the law requires. Whatever I personally think about the attitude of the parties, I must act according to the law as I understand it ; and I think, as a matter of trial, you have failed. It is only in cases where I have doubt as to the law that I would stay the proceedings till the sittings of the full Court.

It may be that on the actual facts, the decision is wrong. My decision is based upon the one point, that, as a matter of trial, you have not brought forward sufficient evidence to sustain your case. That is the groove in which I must run, and the only ground on which I decide.

From this judgment the plaintiff appealed to the Divisional Court, and asked for a new trial, and the appeal came on for argument on December 20th, 1884, before Boyd, C., and Proudfoot, J.

G. Bell, for the plaintiff. If the plaintiff can establish the agreement to release or a mutual mistake, he is entitled to succeed. The correspondence between the plaintiff, as agent of both parties, and the secretary of the society, should have been admitted by the learned Judge at the trial. That evidence was rejected on the ground that correspondence between the secretary of the society and the local agent could not bind the society without a ratification by the society. I could not undertake to prove a ratification because the release has already been put in, and that was the ratification. [*Galt*.—The release was subsequent to the second mortgage, and only released the property from the first mortgage and that would not prove an agreement to release it from the second mortgage.] My contention is, the society took the mortgage subject to all the equities. The release was properly executed by the president and secretary of the society, and under the corporate seal. The agreement as to the release was made by the secretary and so by the society: *Brice on Ultra Vires*, by Green, 2nd Am. ed. 285; *Story on Agency* 4th ed. 315, and if ratified in part is ratified in the whole: *Brice* 338 n. 5, *Ryck v. Canada Life Assurance Co.* 17 Gr. 550, *Smart v. McEwan*, 18 Gr. 623, *Parker v. Clark*, 30 Beav. 54, R. S. O. c. 95, s. 8.

A. C. Galt, for the defendants. The registration is the real question in this suit, and there is no doubt the defendants are purchasers for value without notice: *Gilliland v.*

Wadsworth, 1 A. R. 82, *McDougall v. Campbell* 6 S. C. R. 502. The letters sought to be put in even if admitted could not bind the defendants. The secretary of the society in his evidence said that he had no power to make any such agreement, and it would require to be ratified by the board, which was never done: *Canada Co. v. Pettis*, 9 U.C.R. 669, *Taylor v. Cobourg, &c.*, R. W. & M. Co. 24 C. P. 200 *The Hamilton and Port Dover Railway Co. v. The Gore Bank*, 20 Gr. 190. The evidence will show that the letters could not affect the defendants.

Bell, in reply. *McDougall v. Campbell*, is a very different case from this. I refer also to *Elliott v. McConnell*, 21 Gr. 276.

February 12, 1885. BOYD, C.—The combined operation of R. S. O. c. 111, s. 81, and c. 95, s. 8, forms a complete defence against the plaintiff's right to maintain this action. In July, 1873, all the land in question was mortgaged in fee by Young to the Metropolitan Building Society. There was a second mortgage of the same land between the same parties on the 1st of February, 1875, registered 11th of February. A release of the small part now in dispute was executed by the company on the 9th February, 1875, registered 20th March, 1876; the effect of which was to exempt this part from the operation of the first mortgage, and thereby to release the legal estate in that part, which would be conveyed under the second mortgage to the company. The alleged error occurred at this point, it not being intended, as the plaintiff says, to have this piece included in the second mortgage. Next in order is the mortgage of the whole from Young to Bridges; the plaintiff, of 21st May, 1877 registered the 6th June. Then comes the assignment for value from the Metropolitan Building Society of their mortgages to the defendants on 1st March, 1880, registered in January, 1881, after which Young releases his equity of redemption to the plaintiff on 1st March 1882. The plaintiff is affected with notice of the state of the title in May 1877, and in March 1882. He knows that the small

piece he claims has been mortgaged to the Metropolitan Building Society, and by them assigned to the defendants, and the defendants are, by the Registry Act, justified in relying upon the assignment of the mortgages as conveying to them in security all the land in question. It is not pleaded that the defendants had notice of the alleged error, nor was it asserted in argument that any such proof could be given if the case went down to a new trial. If the plaintiff could overcome the difficulty of the Registry Act, it may be that he should be allowed to adduce evidence of what took place between him and the agent of the Metropolitan Building Society (though it does not follow that it would go far enough to affect the company), but it would be useless to prolong the action further, having regard to this defence. Whatever doubts may have existed before, there is now none that the assignee of a mortgage for value having the legal estate may defend as a purchaser without notice, and claim also the protection of the Registry Act as against a subsequent purchaser or mortgagee from the original mortgagee. Even without the Registry Act, my strong impression is, that as against this collateral equity to reform the mortgage by reducing the amount of land embraced in it, the defendants would have a complete defence, even if the mortgagor were the person who complained. See *Muir v. Dunnet*, 11 Gr. 87; *Tabor v. Cunningham*, 24 W. R. 153; *Judd v. Green*, 34 L. T. N. S. 600; *Nant-y-Glo Blaine Iron Works Co. v. Tamplin*, 35 L. T. N. S. 121; *Warren v. Taylor*, 9 Gr. 61.

The judgment is affirmed, with costs.

PROUDFOOT, J., concurred.

G. A. B.

[QUEEN'S BENCH DIVISION.]

PRATT V. THE GRAND TRUNK RAILWAY COMPANY.

Railways and railway companies — Power to convey lands — Estoppel — Ejectment — Statute of Limitations.

Held, that the Grand Trunk Railway Company, under 14 & 15 Vic. ch. 51, had no power to convey or alienate lands ; and certainly not lands acquired by them for the purposes of the railway, and which were necessary for its construction, maintenance and accommodation.

Quere as to such power under Consol. Stat. Can. ch. 86, sec. 9, subsec. 2. As the deed from the company was not shewn to contain any covenant, *Held*, in ejectment against them, that they were not estopped ; and *Quere*, whether, in any case, they could be estopped in such an action.

EJECTMENT, tried by O'Connor, J., at the last Fall Assizes at Brampton, without a jury, to recover possession of a parcel of land which had been conveyed to, or taken by the Grand Trunk Railway Company for the purposes of the railway, as part of the road-bed and station-grounds at the town of Brampton.

The defence was limited to a portion of the land claimed, which may be shortly described as the part which is covered or nearly covered by the embankment at the place which forms the road-bed of the railway, and is within the ninety feet allowed for that purpose.

The plaintiff claimed under a deed, purporting to be a deed of conveyance from the Railway Company to one John Galt, dated 1st March 1859, comprising several parcels, and the land in question was part of one of those parcels. The plaintiff claimed title from John Galt by several conveyances down to himself. The parcel of land to which the defence was limited had been, from the time of the completion of the railway, and it still was separated from the lands outside the line of railway by a fence enclosing the railway at that side ; and the embankment which formed the road-bed there covered or nearly covered, and still covered the same piece of land. The possession of that piece never changed, notwithstanding the deed of conveyance from the Company. The Company had always remained in possession.

The original deed of conveyance from the defendant to Galt was not produced, and was proved by the production of a memorial thereof from the Registry Office. The memorial merely shewed the bare deed of conveyance and the descriptions of the parcels of land which it purported to convey, and afforded no evidence of covenants of any kind.

At the close of the plaintiff's case a nonsuit was moved for by defendants' counsel, on the grounds, among others, (1) That the deed to John Galt showed no power or authority in the Company to convey the land, and that by law there was no such power or authority. (2) That there was no evidence that the deed contained any covenants, and so there was no estoppel in the way of the defence. (3) That the defendants had title by length of possession.

The objections were overruled for the time, and the defendants proceeded with the evidence for the defence, whereby the facts above summarized were distinctly proved, and also that the piece of land in question was indispensably necessary for the use and purposes of the railway.

At the close of the hearing the learned Judge reserved judgment, and adjourned the case to Toronto, with leave to both parties to furnish him with authorities if they desired to do so.

R. and J. Fleming appeared for the plaintiff.

W. Nesbitt and J. Stewart, contra.

The following cases were referred to: *Breeze v. Midland R. W. Co.*, 26 Gr. 225; *Corporation of County of Welland v. Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147, 31 U. C. R. 147; *Rankin v. Great Western R. W. Co.*, 4 C. P. 463; *Mullinner v. Midland R. W. Co.*, 11 Ch. D. 611; *Hobbs v. Midland R. W. Co.*, 20 Ch. D. 418; *McLean v. Great Western R. W. Co.*, 33 U. C. R. 198.

December 12th, 1884. O'CONNOR, J.—The Grand Trunk Railway Company was incorporated by the Act 16 Vic-

toria, Cap. 37. It incorporated certain clauses of the General Railway Act 14 & 15 Vic., Cap. 51, such as "Powers," "Plans and Surveys," "Lands and their Valuation," &c.

By one of the clauses of the Railway Act 14 & 15 Vic. Cap. 51, incorporated with the special Act, power is given to the Company "to receive, hold, and take all voluntary grants and donations of land, &c., to aid in the construction, maintenance, and accommodation of the railway, but the same shall be held and used for the purposes of such grants or donations only."

The same clause is made part of the Railway Act, Consolidated Statutes of Canada, Cap. 66 (1859); and the next sub-section (sec. 9, sub-sec. 2) of the last mentioned Act gives power "to purchase, hold, and take of any corporation or person, any land or other property necessary for the construction, maintenance, accommodation, and use of the railway, and also to alienate, sell, or dispose of the same."

There is no clause like the last mentioned one in the former Railway Act, 14 & 15 Vic., Cap. 51, nor is there such in the Special Act of Incorporation.

Were such a clause in or incorporated in the Special Act, it might be, and probably would be, necessary to consider whether its operation should not be limited by some such implied words as, "for the purposes of the Act only."

In the absence of a special power to convey or alienate, I take it that the Grand Trunk Railway Company had no power to convey or alienate lands, and that their power to receive or take lands was limited to the ordinary power of Railway Companies to receive or take for the purposes of the railway.

But whether I am right or wrong in this general proposition, I feel quite safe in saying that the Company could not alienate or convey any lands acquired by them for the purposes of the railway, and which were necessary in the construction of the railway, and which have been and are necessary to its maintenance and accommodation: *Mulliner v. The Midland Railway Co.*, L. R. 11 Chy. D. 611, and cases therein cited.

On this ground alone I think the plaintiff's action fails. The doctrine of estoppel cannot avail the plaintiff in this suit, inasmuch as it was not proved that the deed from the Company contained a covenant of seisin or any covenant whatever, even if such a covenant or any covenant could operate as an estoppel against the defendants in an action of this kind.

Besides this, I am clearly of opinion that the defence must succeed under the Statute of Limitations. The Company have been in continuous possession since sometime in 1854.

The possession of the piece of land in question was not changed, though it was included in the deed of conveyance of 1859 to Galt; but I am inclined to think it must have been so included by mistake. I think it unnecessary to consider the other points of the case.

I find the facts as above stated, and I order judgment to be entered for the defendants, with costs of suit.

Judgment for defendants, with costs.

[QUEEN'S BENCH DIVISION.]

MILLICAN ET AL. V HEADON.

Fraud—When contract not void or voidable by reason thereof.

Action on covenant to pay contained in chattel mortgage.

Amongst other defences the defendant set up that the mortgage in question was given for the purpose of defeating and delaying creditors of the mortgagor, and that the plaintiff (the mortgagee) was aware of that at the time, and aided and abetted the defendant, and that by reason thereto the mortgage was void and the covenant could not be enforced against defendant.

Held, that even if the defence was proved, the defendant, being a party to the fraud, should not be allowed to set it up as an answer to his liability on the covenant.

ACTION on a covenant to pay contained in a chattel mortgage, dated 5th April, 1876, and made by the defendant to secure, or purporting to secure, \$1,000, and interest at the rate of eight per cent.

One of the defences set up by the defendant at the trial which, though not appearing on the record, was disclosed by the evidence, was that he made the mortgage to protect his chattels from seizure under execution; that is, to defeat or delay a judgment creditor; and that the plaintiff (the mortgagee) was aware of that at the time, and aided and abetted the defendant, and that by reason thereof the mortgage was void, and the covenant could not be enforced against the defendant.

The case was tried at the last Winter Assizes at Hamilton, before Armour, J., without a jury, who found in favour of the plaintiffs.

The facts sufficiently appear in the judgment.

February 11, 1885. Osler, Q. C., and Fitzgerald, moved to set aside the judgment in favour of the plaintiffs on the law and evidence, contending that the plaintiffs could not recover because the mortgage was made to defeat creditors, referring to *Evans v. Richardson*, 3 Mer. at p. 470; *Fry* on Sp. Per., 2nd ed., 211; *Bump*, 3rd ed. 443, 447, 448, 454

Watson, contra, referred to no authorities, but contended that the onus was upon the defendant to establish the proposition set up by him.

March 7, 1885. O'CONNOR, J.—The defence set up by the defendant is extraordinary and, I think, unusual. Because he made the mortgage for the purpose stated, therefore, he says, both mortgage and the covenants therein contained are void, being contrary to public policy, and the plaintiffs ought not to be permitted to prosecute their action; in other words, he sets up his deliberate fraud to protect himself from the effect of his own covenant. I am not aware of any precedent for this. Fraud may be pleaded or set up as a defence in various ways and with effect; and in some instances a Court of law or equity will take notice of a fraud or wrongful act so as to defeat an action or a defence, although it be not pleaded or set up by either party to the suit; and this is done on the ground that the fraud or wrongful act so noticed is contrary to public policy. But to allow a man to escape from the effect of his covenant on the ground that it was deliberately made by him for a fraudulent purpose, a purpose, too, which involved subornation of perjury, seems to me an astounding proposition. The rule of the Courts of Civil Judicature is, I think, in such a case, to leave the person who has committed a fraud to the legal consequences of his act, to the exigencies of the position in which his own fraud has placed him: relief it cannot give him.

The learned Judge then commented upon the evidence, on which he decided that the finding was right, and should not be disturbed.

WILSON, C. J., and ARMOUR, J., concurred.

Motion dismissed, with costs.

[CHANCERY DIVISION.]

POWELL V. CALDER ET AL.

Chattel mortgage—Preference—Judgment creditor—Infancy.

S. & W., a firm, of whom W. was a minor, becoming embarrassed arranged with H., the managing man of J. G. & Co., their principal creditor, to give security for their debt. At the instigation of H. two notes for the amount of their indebtedness, maturing at short dates, were made by S. & W., payable to P., and endorsed to J. G. & Co. by P., who was a brother-in-law of J. G., and connected with him in another business, and a chattel mortgage was given by S. & W. on everything they had in their business to P. to secure him, and \$50 was paid him by J. G. & Co., for endorsing the notes. A few days after the mortgage was given C. caused the sheriff to seize S. & W.'s goods under an execution in his hands, received subsequent to the making of the mortgage.

In an interpleader action between P., claiming under the chattel mortgage, and C. claiming under his execution,

Held, that the mortgage must be treated as if given to J. G. & Co., for it was made to P. only as a device to avoid the statute against fraudulent preferences, and that upon the evidence, set out below, it must be held void as against creditors.

Pressure will not validate a security unless it be a *bona fide* pressure to secure a debt, and without a view of obtaining a preference over the other creditors.

Sembles, that the share of the infant W did not pass by the chattel mortgage, nor by the assignment for the benefit of creditors which was afterwards made.

THIS was an interpleader issue between Ambrose B. Powell and the firm of Calder & Co., to try the question whether certain goods seized under an execution against a firm of Shain & Williams, issued at the instance of the defendants, were the property of the defendants as against the plaintiff, who claimed them under a chattel mortgage.

The issue was tried at the sittings held at London, on January 13th, 1885, before Proudfoot, J.

The facts sufficiently appear in the judgment.

Meredith, Q. C., and *Gibbons*, for the plaintiff. The question to be considered is, was the chattel mortgage to the plaintiff a fraudulent preference. The evidence shews that it was not. Pressure was used by the creditors Green & Co., to compel the debtors, Shain & Williams, to give the chattel mortgage, and the plaintiff Powell gave a valuable

consideration for the mortgage, when he became endorser on the notes. He became liable to pay them, and the evidence shows he did pay them: *Nelles v. Paul*, 4 A. R. 1. The execution creditor cannot raise the question of the invalidity of the mortgage, as the assignment by Shain & Williams to Blackley for the benefit of creditors intervenes, *Parkes v. St. George* (a) settles this. The evidence does not show any notice to Powell of the inability of Shain and Williams to pay in full.

Lash, Q.C., for the defendant. The plaintiff cannot set up the rights of the assignee Blackley, and he has made no claim himself and is no party to this suit, the question is between the plaintiff and the defendants: *Meriden Silver Co. v. Lee*, 2 O. R. 451; *Parkes v. St. George* (a); *Kitchen v. Hicks*, 6 O. R. 739. R. S. O. c. 119, provides for chattel mortgages given for future advances and for endorsements but these words are used in sec. 6, "and in case the mortgage is executed in good faith, and sets forth fully, by recital or otherwise, the terms, nature and effect of the agreement," &c. In April, Green was informed that Shain & Williams were getting behind, and on June 26th that they were willing to make an assignment for the benefit of creditors. Green's manager arranged with the plaintiff to take the chattel mortgage before he even saw the insolvents. The agreement referred to in the statute refers to an agreement between the mortgagor and mortgagee, but there was no such agreement here. The agreement here was not to pay the notes at maturity; therefore the agreement was not truly set forth in the mortgage, the mortgagee incurred no liability for the mortgagor, but for Green. There is no evidence of pressure, and the notes were not paid until after this action was commenced. Defendant's judgment is good until set aside. I refer to *Ex p. Hall*, 19 Ch. D. 580; *Ex p. Hill*, 23 Ch. D. 695; *Ex p. Griffith*, 23 Ch. D. 69; *McDonald v. McCall*.

Meredith, Q.C., in reply. The provisions in the Chattel Mortgage Act, R. S. O. c. 119, as to agreement, are not

(a) Since reported, 10 A. R. 496.

applicable here. All that the plaintiff had to do, to entitle him to the benefit of his security, was to endorse the notes: *O'Donohoe v. Wilson*, 42 U. C. R. 335. The agreement is that evidenced by the endorsement. The good faith referred to in the statute is that of Powell, and is not impeached at all: *Holmes v. Penny*, 3 K. & J. 90; *Barron on Bills of Sale*, 166. As to pressure see *Whitney v. Toby*, 6 O. R. 54; *McCrae v. White*, 9 S. C. R. 22; *Meriden Silver Co. v. Lee*, 2 O. R. 451, *Kitchen v. Hicks*, 6 O. R. 739. Even if the defendants' contention succeeded, Blackley the assignee would be a trustee for Powell: *Nolan v. Donnelly*, 4 O. R. 440.

January 29, 1885. PROUDFOOT, J.—Interpleader issue. Whether certain goods, seized in execution by the Sheriff of Essex, under a *fit. fa.*, tested 28th July, 1884, issued upon a judgment recovered by the defendants against Shain & Williams, were at the time of such seizure the property of Powell as against the defendants.

Powell claims the goods by virtue of a chattel mortgage dated 3rd July, 1884, made by the defendants, Shain & Williams, filed 4th July, 1884.

At the time of making this mortgage Williams was, and still is, an infant.

The mortgage was made to secure Powell for his indorsement of two promissory notes, for the accommodation of Shain & Williams, each dated 3rd July, 1884, and made payable to the order of Powell and endorsed by him, one for \$1,500, at ten days, and the other for \$2,200, at 30 days after date.

The articles mortgaged were "All the stock in trade consisting of dry goods, clothing, gent's furnishings, groceries, and boots and shoes, situate and now being in and about the premises occupied by the mortgagors as a store, and situate on the east side of Talbot street, in the village of Essex Centre, in the County of Essex, such store being owned by George T. Munro.

All the shop furniture and other chattels now in or about the said premises.

All books of account owned by the mortgagors, and all book debts and choses in action now due or accruing due to them as set out in said books or elsewhere.

All goods hereafter, during the currency of this mortgage, received into said store."

Shain & Williams made an assignment for the benefit of creditors on the 23rd July 1884, to David Blackley, which was filed on the 26th July, 1884. It was signed by Arthur Williams as a creditor of Shain & Williams.

The goods were seized by the Sheriff on the 28th July, 1884.

The circumstances under which the mortgage was given appear to be as follows:

Shain & Williams were indebted to John Green & Co. to about the amount of the mortgage. The principal partner in Green & Co, John Green, was absent in Europe. Shain & Williams finding a difficulty in making collections, and that the business was "playing out," sent Arthur Williams, the father of the partner Williams, to see Green & Co., in June 1884. He saw the managing man of the firm, Hayes, not a partner, and told him that Shain & Williams, were ready to make an assignment for the benefit of their creditors, and gave him figures showing the book debts and liabilities, and stock taken at cost, not adding freights, which showed a deficiency of about \$200. This was on the 26th June.

Soon after Hayes sent a telegraph to Shain & Williams, to come to London, which they did on the 3rd July, and saw Hayes, when he told them he thought it best they should give a chattel mortgage of the stock. They told him that if left alone they would get through with the difficulty all right. Hayes said the mortgage would have to be made to Mr. Powell to make it legal and good. Powell is a brother-in-law of John Green, and carries on a retail business in London, in which John Green is a silent partner. Hayes took them to Mr. Gibbons's office, where they met Powell, and the mortgage was executed, and the notes signed and indorsed. Powell was paid \$50 by Green & Co. for indorsing.

The debt to Green & Co was about four-fifths of the whole liability of the debtors.

The debtors told Hayes it would be impossible for them to pay the notes to Powell when due. Hayes said he did not expect it. Shain says he thought they could carry on, that the transaction was entered into in good faith, and with the intention of carrying on business. The notes to Green & Co. were not all due on 3rd July, but all were to mature during July.

I think that no distinction can be made between Powell and Green & Co. in this transaction. There does not seem to have been any intention of making him liable on the notes, but that plan was resorted to in the design of making the transaction legal.

The case must be determined then upon principles that would govern it if Green & Co. were the mortgagees.

I understand the decision of the Court of Appeal in *Parkes v. St. George* (a), to be, that an execution creditor under the circumstances of this case can, but a simple contract creditor cannot impeach the validity of the chattel mortgage.

In form the mortgage was not objected to, nor was there any defect in the registration : if invalid it must be for want of *bond fides*.

Some of the facts are such as to give rise to grave suspicion as to the motive for taking this security. The creditors were informed about a week before the mortgage was taken of the inability of the debtors to meet their liabilities. When they do require security they apprehended they could not take it direct to themselves, and the plan was adopted of having it taken to Powell, who was not a creditor, to secure him for his indorsation of their paper, for which he was paid by the creditors; and I think the proper deduction from the evidence is, that it was not intended he should really be liable on that paper to the creditors, but the transaction only assumed this shape

(a) Since reported, 10 A. R. 496.

as a device to evade the statute against fraudulent preferences.

On the other hand, it is said there was pressure on the part of the creditors; and that the debtors told them they thought if time were given they could pull through.

Pressure will not validate a security unless it be a *bona fide* pressure to secure a debt, and without a view of obtaining a preference over the other creditors.

Could there have been any reason in good faith for supposing that upon the execution of this mortgage and the making of the notes, the debtors could carry on their business? The statement of assets and liabilities showed barely an equality on the debtors' own figures. The debt to the creditors was not all due when the mortgage was taken, a fact which of itself might not invalidate the security, but taken in connection with other facts gives strong ground for questioning the good faith of the transaction. The notes for the debt due to the creditors, were all to mature during the month of July. The notes for which the mortgage was taken as a security were taken payable at ten days and thirty days from the 3rd of July, so that no time was given, no new advance made, and no security that these notes or the mortgage would not be enforced when they fell due, save a vague statement of Hayes that the creditors did not expect the notes to be paid at maturity.

If the transaction was one entered into solely for the purpose of obtaining security for the debt, why was it not taken to the creditors direct, instead of through the agency of their nominee? If *bona fide* it would have been perfectly good.

The mortgage covered all the goods then in the store of the debtors, all the shop furniture and other chattels, all the books of account, and all the book debts, and all goods thereafter to be received into the store. So that upon default made on the 3rd August, a default the creditors knew would take place, they could step in and close up the whole business.

In the view I take of the case it is not necessary to consider the effect of the execution by the infant partner of the chattel mortgage. My impression is, that the infant's share was not affected by it. And in like manner the assignment for creditors, according to my impression, would not pass his interest; but as the goods are seized upon Calder's execution and he expresses his readiness to let them pass into the hands of the assignee, this is not of so much importance. I must assume that Calder's judgment against the infant was properly recovered.

I notice also that Hayes, with whom the affair was negotiated, was not called to support it.

Upon a consideration of the whole case, I think I must come to the conclusion that this mortgage is invalid, "null and void against the creditors." And as the execution creditor expresses his readiness to allow the property to pass into the hands of the assignee for the benefit of all the creditors, it will be so ordered.

G. A. B.

[CHANCERY DIVISION.]

RICHARD ET AL V. STILLWELL.

Guarantee—Form of—How sent and received—Names of Parties.

In an action for the price of goods supplied by the plaintiffs to C. A. E., it was proved that the plaintiffs received in an envelope, addressed to their firm, the following letter :—

“ LAKE SUPERIOR, ONT.,
“ July 4th, 1883.

“ GENTLEMEN,—I beg to inform you that I have assumed all liabilities of the S. P. Co. lately carried on by Mr. C. A. E., and am responsible to the amount contracted by him up to July 24th, 1882.
“ Kindly ship chases immediately.

“ Respectfully yours,
(Signed), “ C. J. S.”

The envelope was lost, but its receipt and the address on it were proved. Held, a sufficient agreement in writing to satisfy the statute for that the address on the envelope referring to the “gentlemen” within showed that the plaintiffs were the persons guaranteed.

THIS was an action brought by John Richard and his partners against Charles J. Stillwell, for the price of certain

goods, part of which was supplied to one C. A. Everitt, and part to the defendant.

The writ was originally endorsed for \$584.76, which was the total amount of the goods supplied, and an order was obtained under Rule 80 O. J. A., by the plaintiffs from the Master in Chambers on March 4th, 1885, for leave to enter judgment for \$233.62, being the amount furnished to the defendant himself, without prejudice to the plaintiff's right to proceed for the amount of the goods supplied to Everitt.

The action as to the balance of the claim was proceeded with, and was tried at Toronto on April 25th, 1885, before Boyd, C.

The evidence showed that C. A. Everitt had carried on business at Port Arthur under the name of the "*Sentinel Printing Company*," and had purchased goods from the plaintiffs to the amount of \$351.14, when he sold out the business to the defendant: that the defendant then ordered, some more goods from the plaintiffs, which they forwarded, and asked for an acknowledgment from him of the indebtedness of the "*Sentinel Printing Company*," as they alleged had been previously promised by him to their agent, a Mr. Patterson; that defendant subsequently ordered more goods from the plaintiffs, but they declined to supply them until they received the acknowledgment asked for, and that they then received by mail an envelope addressed to their firm, which contained a guarantee in these words:

"LAKE SUPERIOR,

"Ont., July 4th, 1883.

"GENTLEMEN,—I beg to inform you that I have assumed all liabilities of the "*Sentinel Printing Company*," lately carried on by Mr. C. A. Everitt, and am responsible to the amount contracted by him up to July 24th, 1882.

Kindly ship chases immediately.

"Respectfully yours,

(Signed) "C. J. STILLWELL."

and the subsequent bill of goods was then shipped.

The envelope had been lost, but the loss of it, as well as its receipt, and how it was addressed, were all proved.

W. M. Hall, for the plaintiffs. The plaintiffs are entitled to recover, as the guarantee was enclosed in a letter addressed to them, and that is sufficient under the statute. Any kind of written paper which either contains the terms of the agreement or refers to any paper of any kind by which it can be ascertained is a sufficient memorandum in writing within the statute: *Stead v. Liddard*, 8 Moore 2; *Brettel v. Williams*, 4 Ex. 623; *Cave v. Hastings*, 7 Q. B. D. 125; *Story* on Contracts, 5th ed., s. 1,116. A guarantee not addressed to any one will inure to the benefit of those to whom or for whose use it was delivered: *Walton v. Dodson*, 3 C. & P. 162. The case of *Williams v. Lake*, 2 Ell. & Ell. 349, does not apply to the guarantee in this case; there the guarantee was delivered to the person here it was enclosed in an envelope addressed to the plaintiffs, and these two make one instrument, and contain all the requisites of a guarantee: *Allen v. Bennett*, 3 Taunt. 169; *Leake* on Contracts, 266; *Coles v. Trecothick*, 9 Ves. 250; *Gosbell v. Archer*, 2 A. & Ed. 500.

G. H. Watson, for the defendant. The plaintiffs cannot succeed. The evidence shows that the case fails, as not being sufficient under the statute. Everitt was the debtor, and Stillwell was to guarantee the payment of his debt, and the writing upon which the plaintiffs claim to succeed as a guarantee does not contain the name of the parties guaranteed, i.e., the plaintiffs: *The Corporation of the County of Huron v. Kerr*, 15 Gr. 265; *Williams v. Lake*, 2 Ell. & Ell. 349; *Whitlaw v. Taylor*, 45 U. C. R. 446.

April 30th, 1885. BOYD, C.—Under the 4th section of the Statute of Frauds no action shall be brought * * upon a contract * * unless some memorandum or note thereof shall be in writing, &c., and signed by the party to be charged, &c. This by judicial construction intends that the name of the contracting parties shall appear upon the face of the memorandum either expressed or by reasonable construction, or by reference to other documents physically or referentially attached thereto.

The cases cited do not govern here, having regard to the circumstances of the present case. In *Williams v. Lake*, 2 Ell & Ell. 349, the letter of guaranty was written in anticipation of there being a contract concluded between the person to whom it was addressed and another with whom he was in treaty for the performance of certain work. There was in fact no person to whom it could be addressed, and it was in blank so far as regarded the name of the person to be guaranteed. It was in these words:

"Sir, I beg to inform you that I shall see you paid the sum of £800 for the ensuing building which you undertake to build for T. and O.

I am, Sir, yours, &c., THOS. LAKE."

As was pointed out by Blackburn, J.: "The defendant handed this document to Thomas in order that he might deliver it to the person meant in it by 'you.' At that time Thomas Jones was this person; now, Williams, the plaintiff, would be the person. In order to ascertain who is the person parol evidence is necessary—evidence which it was the object of the Statute of Frauds to exclude in all these cases: 2 Ell. & Ell. p. 355.

During the argument of *Catling v. King*, as reported in 25 W. R. 530, James, L. J., referred to *Williams v. Lake* as a case that ought never to have been reported, and thus explained it. The document in that case was addressed by the defendant to "you;" it was intended for A. B., but was handed to C. D., and then C. D. wished to sue on it.

The other case cited of *Corporation of Huron v. Kerr*, 15 Gr. 265, was following in the line and based upon the authority of *Williams v. Lake*; but that line is not to be so broadened as to extend to the present case.

Wulton v. Dodson, 3 C. & P. 162, cited for the plaintiff, is virtually overruled by *Williams v. Lake*. The *Nisi Prius* case is cited in *De Colyar's Law of Guarantees*, 148, Am. Ed., 188, for the statement in the text that a guaranty not addressed to anybody will inure for the benefit of those to whom or for whose use it was delivered. The decision when examined will be found to rest upon a bald dictum of a not very strong Judge.

Fell, on Mercantile guaranties, also lays down the law, p. 47, as in *De Colyar*, and further cites what was said by the Lord Chancellor in *Coleman v. Upcott*, 5 Vin. Abr. 527, in this manner : " If a man (being in company) makes offers of a bargain, and then writes them down and signs them ; and another person takes them up, and prefers his bill, that will be a sufficient agreement to take the case out of the statute." But in *Sugden* on Vendors it is pointed out that the correct words were not "another person" but "the other party," and the learned author points out that in the case put the purchaser's name would appear in the offer : 14th ed., p. 132, note 1.

It seems to me perfectly clear in the present case that the statute is satisfied, so that everything contemplated by the Act is certain without the aid of parol evidence. The guaranty is in the form of a letter, and thus worded :

[The learned Chancellor here read the letter as set out *ante* p. 512.]

It was by the defendant written, signed, addressed, and mailed to the plaintiffs. It was enclosed in an envelope directed to the plaintiffs. It was intended for the plaintiffs, and became their property from the moment it left the defendant's hands and was committed to the post office. Suppose the letter had been brought into Court as it reached the plaintiffs and then opened ? Could any doubt have existed, or could any oral evidence have been required to show that it contained a guaranty from the defendant to the plaintiffs ? The "gentlemen" in the epistolary part would then be by necessary implication connected with the superscription upon the envelope, so that the name of the persons guaranteed would be constructively incorporated into the body of the guaranty. The mere opening of the letter previously when it arrived in due course, and the loss or destruction of the envelope, does no more than necessitate the introduction of evidence to explain these details, which is not forbidden by the Act nor by any case. The law would be in a scandalous state if I were unable to give judgment for the plaintiffs, which I now do, with costs.

G. A. B.

[CHANCERY DIVISION.]

TRAVIS v. TRAVIS.

Donatio mortis causa—Gift inter vivos.

The defendant's mother, being ill, gave the key of a drawer in a bureau where a mortgage, made by the defendant to her, was kept, to her son J., telling him that she wanted him to give the mortgage to the defendant in case she should not see him again. The defendant was afterwards sent for and came to the house. He saw his mother alone, and deposed that she said : " Robert, your mortgage is there in that drawer—when you go home you can take it with you." He went away without getting it, and she died intestate. After her death J. gave him the mortgage.

Held, that the mandate to J. was revoked when the mother saw the defendant, and as there was no delivery after that by her there was no gift of the mortgage to him.

The mother had signed and given to defendant a year before her death, a receipt for interest on the mortgage, and had endorsed a similar receipt on the mortgage, but no money was paid.

Held, a valid gift of the interest.

THIS was an action brought by George Douglas Travis, as administrator of Barbara Travis, deceased, against Robert W. Travis, a son of the deceased, for the foreclosure of a mortgage made by him to her dated July 11th, 1874.

The action was tried at Hamilton, at the Spring Sittings held on March 30th, 1885, before Boyd, C.

It was admitted that the defendant had made the mortgage, and that the deceased had on January 23rd, 1883, given the defendant a receipt in the following language: "Grimsby, January 22nd, 1883, received from Robert W. Travis the sum of \$191.25, being interest on mortgage dated July 11th, 1874." A similar receipt was also endorsed on the mortgage.

It was also admitted that these receipts had been signed by the defendant, but that the matter was a pure gift, and that no money had passed.

The evidence went to show that on January 7th, 1884, the deceased called her son John H. Travis into her presence, and gave him the key of the drawer in which Robert's mortgage was kept, she having always kept the key herself before, and requested him to give the mortgage to Robert, and to no one else, if she should not have the privilege of

seeing him again. She also directed John to endorse upon the mortgage a receipt for the principal and interest then due, which he did in the following words: "Received upon within mortgage \$472.50, January 7th, 1884," but this receipt was never signed by the deceased.

Subsequently, on January 9th, Robert, who lived at some distance, came to see his mother, who was sick, in answer to a telegram received from John. After he had been in the house a few hours she sent for him and he went into her room, and she told him that she had sent for him, and that his mortgage was in the drawer in the cupboard in the room in which she was lying, and that he was to take it. The defendant remarked that that was all right, and after some conversation left the deceased's presence. After the defendant had that conversation with his mother, John D. Travis unlocked the drawer and showed the defendant the mortgage, saying "Here's the mortgage mother wished to give you," and he said, "Yes, she told me of it." After her death John showed him the mortgage and suggested his taking it home with him, but he said "No, you had better fetch it up with you." The deceased died intestate on or about January 14th. John H. Travis afterwards handed the mortgage in question to his brother, the defendant, and he had had possession of it ever since.

McCleve, for the defendant. There was a sufficient delivery of the mortgage or a sufficient act with reference to it to constitute a *donatio mortis causa*. The key was delivered to John H. Travis to give the mortgage to the absent son, and that was sufficient delivery of the mortgage to vest the property in the defendant. She constituted herself a trustee for him. At all events the defendant having legally got possession of the security before letters of administration were taken out, the plaintiff could not recover it in trover nor can he foreclose: *Aston v. Pye*, referred to in *Eden v. Smyth*, 5 Ves. 350; *Watson v. Bradshaw*, 6 A. R. 666; *Re Murray—Purdham v. Murray*,

9 A. R. 369 ; *Tiffany v. Clarke*, 6 Gr. 474 ; *Peace v. Hains* 11 Ha. 151 ; *Yeomans v. Williams*, L. R. 1 Eq. 184 ; *Kerr v. Read*, 23 Gr. 325.

Muir and Crerar, for the plaintiff. There was no *donatio mortis causa*. In any event the delivery was not complete. The instructions to John were only conditional on the deceased not seeing defendant again, and she did see him and that cancelled the whole thing : *Richards v. Delbridge*, L. R. 18 Eq. 11 ; *Warriner v. Rogers*, L. R. 16 Eq. 348 ; *Powell v. Hellicar*, 26 Beav. 261 ; *Riddell v. Dobree*, 10 Sim. 244.

At the close of the case the learned Chancellor found as follows :—

The question is as to effect of evidence of an alleged *donatio mortis causa*. I rather think that there is a want of precision and corroboration in the evidence on the vital point. John H. Travis proves that the key was delivered to him by his mother of the bureau where the mortgage was, with instructions that she wanted him to give the defendant the mortgage if she had not the privilege of seeing him again. She, however, did see the defendant again, so that the mandate was thereby revoked. There is no corroboration of what took place between the defendant and his mother, if even his evidence goes far enough. They were in the room together where the bureau and mortgage were. The keys were then with the defendant's brother John H. Travis, who was not there. The mother said : "Robert your mortgage is there in that drawer in that bureau : when you go home you can take it with you," the defendant said, "all right." Nothing more occurred then as stated by the defendant. The brother John H. Travis gives an account of a conversation between him and the defendant afterwards in the same room while the mother was unconscious, but this is not spoken of by the defendant, and I do not think that it carries the matter any further, even if it is considered as proved.

Nothing more occurred of moment till after the intestate's

death, when the mortgage was handed over to the defendant by his brother before the plaintiff had obtained letters of administration.

I find no evidence of any delivery of the mortgage actual or symbolical, to the defendant prior to the death of the intestate. An intention was expressed to benefit the defendant, but there was no completed action taken to give effect to that intention during the life of the alleged donor. Upon the facts I think that no case is made out to justify the finding that there was a gift to the defendant by the deceased of this security, either as *inter vivos* or as *mortis causa*.

The learned Chancellor then intimated that he would look into the cases handed in before the decree should issue, and on April 22nd gave the following judgment :

BOYD, C.—I have looked at the cases handed in by Mr. McClive, but further consideration has confirmed the opinion I entertained at the close of the case.

There was no actual or manual delivery of the mortgage in this case by the deceased to the defendant, nor was there anything in evidence which amounted to a symbolical delivery. The deceased gave the key of the bureau where the mortgage was kept to her son John Travis, telling him that she wanted him to give the mortgage to the defendant in case she had not the privilege of seeing him again. This was on 7th January, 1884. She told the son to endorse a receipt on the mortgage at that time, which he did, but it was not signed.

The defendant was then sent for, and came to the house where his mother was lying ill. He saw her alone two days afterwards. This is his account of what then occurred : "She said 'Robert your mortgage is there in that drawer in that bureau, when you go home you can take it with you, I said 'all right.' Nothing more was said that I recollect.'

He went home without getting it or taking it, and she died intestate on the 15th January.

The mother's mandate to the son John was *ipso facto* revoked when she saw the defendant, and there was no delivery of the mortgage to him after that. I may refer to the case of *Powell v. Hellicar*, 26 Beav. 261; and *Young v. Derenzy*, 26 Gr. 509, upon the importance of delivery in cases of *donatio mortis causd.*

The case of *Casnahan v. Grice*, 15 Moo. P. C. 215, justifies a jealous investigation of the evidence, and of the conduct of the parties, especially where as here the donor was of great age, and evidently in a very feeble condition. It is to be observed that the mortgage was not in the hands of the defendant, or even touched for that purpose till some weeks after the mother's death, although from the tenor of the evidence given it might have been taken possession of by him forthwith. The defendant's contention is not supported by evidence of the clearest and most unequivocal character, which is a necessary prerequisite for his success as indicated by Lord Chelmsford, L. C., in the case last cited.

The evidence is, however, sufficient to shew a valid gift of the interest accrued due upon the mortgage to the 23rd July, 1883, as manifested by the endorsement on the mortgage, and the signed receipt given to the defendant: *Yeomans v. Williams*, L. R. 1 Eq. 184. As to all the rest of the security, principal and interest, the evidence at the highest only shews an unfulfilled intention on the part of the deceased to benefit her son the defendant.

The usual judgment in mortgage cases will be awarded to plaintiff, with costs.

G. A. B.

NOTE.—This case is about to be taken to the Court of Appeal.—R.M.P.

[CHANCERY DIVISION.]

LEAN V. HUSTON.

Article patented in foreign country—Improvements—Original ideas—Employment of mechanic to make model—Enjoining manufacture under a patent obtained by him.

The plaintiffs were the patentees of a certain invention in the United States, and being desirous of having the article with some improvements patented in Canada, one of them employed one of the defendants, a mechanic, to make a model, and under the pledge of secrecy placed the United States patent in his hands and imparted to him his ideas as to the improvements. It was afterwards discovered that the defendant so employed had, during his employment, taken out a patent for a similar article, under which he and the other defendants were manufacturing.

In an action brought to set aside this patent and for an injunction restraining the manufacture by the defendants of the article, it was contended on the latter's behalf, that the article was not protected in Canada by the United States patent, and in fact that the idea was public property. Held, following *Morison v. Moat*, 9 Ha. 241, that the plaintiffs had the right to succeed as to the injunction, and that their title was good as against the defendants, even though they might not have a good title against the public.

THIS was an action brought to set aside a patent obtained by the defendant R. M. Huston for a combined folding bed and wardrobe, which patent was alleged to have been obtained in fraud of the plaintiffs upon information imparted by one of them to him under a plea of secrecy : and for an injunction restraining manufacture thereunder by the defendants.

The facts are sufficiently set out in the judgment of the learned Judge.

The action was tried at the sittings at Toronto, on December 11th and 12th, 1884, before Ferguson, J.

Moss, Q. C., and F. E. Hodgins, for the plaintiffs. The evidence clearly shows that the defendant R. M. Huston was employed by the plaintiff Thomas C. Lean to make the model on instructions furnished by him, that secrecy was imposed and agreed to, and that the thing was entirely new to defendant. The defendant cannot use or adopt the ideas that were disclosed to him by the plaintiff, although the public might do so; nor could he use what he invented himself.

in conjunction with what was imparted to him. *Morison v. Moat*, 9 Ha. 241, shows that the Court can restrain the defendant from making an improper use of the knowledge he got from the plaintiffs. A workman asked to "study up," could not claim to be the inventor as against the party who so instructed him: *Bonathan v. Bowmanville Furniture Manufacturing Co.* 31 U. C. R. 413, see also *Hessin v. Coppin* 21 Gr. 253. The defendant R. M. Huston should be declared a trustee for the plaintiffs, and he and the other defendants should be restrained from manufacturing or dealing with the patent itself. This case may be likened to one where the remedy sought was to restrain the infringement of a patent: *Penn v. Bibby*, L. R. 2 ch. 127; *Yates v. The Great Western Railway Co.* 2 A. R. 226, 230, 246. The differences introduced by the defendants are not differences at all: *Waterhouse v. Bishop* 20 C. P. 29; *Parkes v. Stephens* L. R. 8 Eq. 358, L. R. 5 Ch. 36; *Harwood v. Great Northern Railway Co.*, 11 H. L. C. at p. 683; *Patterson v. Gas Light & Coke Co.* 2 Ch. D. 812; *Cropper v. Smith*, 26 Ch. D. 700.

Bain, Q.C., and *Malone*, for the defendants. The plaintiffs are not the patentees, and hold no patent legal in Canada. They are not even the inventors in the United States patent. The only case in which a plaintiff can enjoin a defendant without a writ of *scire facias* is where the plaintiff has a patent to be infringed and which is infringed: *Copeland v. Webb*, 11 W. R. 134. The plaintiffs must shew that they have some individual right which is being infringed. So far as the American patent was concerned, they had no rights at all: *Plimpton v. Malcolmson*, 3 Ch. D. 557. In *Morison v. Moat*, 9 Ha. 241, the plaintiff had the secret which was his property. The plaintiffs must shew that they had the whole scheme or design worked out, otherwise they cannot claim anything, and the evidence shews that was not the case in this action. No rights whatever arose by reason of communicating the American patent or the promise of secrecy. The plaintiffs cannot attack the defendant's patent: *Johnson's Patentee's Manual*, p.

10; *Curtis's Law of Patents*, 4th ed., secs. 119 to 123. The defendant R. M. Huston cannot be declared a trustee, nor can an assignment be claimed of the patent. The injunction, if any, can only reach the plaintiffs' improvements,

Moss, Q. C., in reply. The plaintiffs do not seek to avoid the defendant's patent. The Court has a right to act upon the parties. The Court in Crown land cases declares the patentee a trustee for the party defrauded. If the plaintiffs had shown the American patent to the defendant for the purpose of having a model manufactured, and the defendant had then fraudulently obtained a patent for the article in Canada for himself, surely the patent would belong to the plaintiffs.

March 30th, 1885. *FERGUSON, J.*—The plaintiffs are Thomas C. Lean, John B. Horne, and Raglan Cooper. The defendants are Robert Moore Huston and Huston Brothers. The plaintiff Thomas C. Lean resides in Toronto, the other plaintiffs are resident in the United States. The plaintiffs were the owners of a United States patent of invention of a combined folding bed and wardrobe. It is alleged that the plaintiffs were also the inventors of some modifications and improvements of the invention. In the month of October, 1883, the plaintiff Thomas C. Lean, by the authority and instructions of his co-plaintiffs, and as part owner of the patent, was intending to apply for and obtain a patent in Canada for the same invention, with certain of the modifications and improvements. For this purpose he had been advising with a patent solicitor in Toronto. The United States patent was at this time more than one year old. The plaintiff Thomas C. Lean was, as appears by the evidence, not aware that this fact would stand in his way in endeavouring to obtain a patent in Canada until he was so advised by the patent solicitor, who told him that he could not obtain a patent in this country for the identical invention. To this he replied that the plaintiffs were the inventors of the improvements, and that he would apply for a patent

for these. He wanted a model made, or at least he thought so, and he employed the defendant Robert M. Huston, who is a mechanic, a cabinet-maker, as I understood from the evidence, to make this model for the purposes of the department at Ottawa. The plaintiff, Thomas C. Lean, in his evidence, says that this was to be a model of the patented invention with the changes or modifications and improvements. The defendant Robert M. Huston, in his evidence, sought to say that this was not the fact, and that what he was employed to make was a model of the invention as patented in the United States, but I may say that I did not believe him. In his evidence in chief he said: "I did not, while I was doing the work, receive from the plaintiff Thomas C. Lean any instructions for any alterations in or changes from these plans" (the plans appertaining to the U. S. patent). In his cross-examination he said: "It was an entirely new thing to me. It set me thinking how I was going to work out his plans, and as I worked on I found that his ideas were a failure."

There were many things in the evidence of this defendant, and in the manner in which he gave it, which led me to the conclusion that I should not believe him when he stated what was contrary to other evidence, or was contradicted by other witnesses, and I much prefer the evidence of the plaintiff Thomas C. Lean to his evidence. There was other evidence supporting the evidence of Thomas C. Lean in this respect, and I find upon the evidence that the defendant Robert M. Huston was employed as and for the purpose stated by Lean. I also find upon the evidence that it was part of the bargain made between these two that the defendant Robert M. Huston was not to disclose the information that he received on the subject from Thomas C. Lean, either the contents of the United States patent or of the intended modifications and improvements, Lean swears to this most distinctly. His testimony is, in this respect at least, partially supported and corroborated by that of his wife. The defendant Robert M. Huston himself says in his cross-examination that Lean told him

hat he did not want his American patent talked about, and he says: "I thought it was a pledge of secrecy." When the defendant Robert M. Huston was about commencing the work under his employment, he said he would rather *first* make a bed and wardrobe of the full size than a small model. This appears to have been agreed to. He said he would rather make it at his own place, because he had a bench there. This was objected to, for the reason that the matter would in that case not be so easily kept a secret, and it was agreed that the bench should be removed to the plaintiff Thomas C. Lean's shed. And it was accordingly so moved, and what work was done under the agreement was done there. The bench was moved by the two together. The United States patent was placed in the hands of Huston for the purpose of the work, and he was told of the improvements intended. The work did not progress rapidly. For this Lean blames Huston, and Huston, on the contrary, endeavours to make out that this was because he could not understand the ideas of Lean, which he says were immature and useless; but if, as he endeavours to make out, he was only to make a model or an article of full size, according to the United States patent, he could not have experienced the difficulty he states in respect of Lean's ideas, for he had the patent in his hand. There were some springs and cog-wheels that were a portion of what was patented by the United States patent. The office of these seem to have been to raise the bed so as to place it within the wardrobe. Difficulty was experienced in obtaining these of the proper kind, and Lean eventually concluded to do away or dispense with these, and use a "fixed pivot," raising the bed by hand, and so informed Huston. Lean says that he had told Huston if he found it too cold to work in his shed, he might stop for a time, and that, on the 21st of December, 1883, Huston told him that he intended going to Michigan to see his brothers, and that he did go on the 22nd of December. Huston came back, and in January he and Lean met at the shop door of the latter, but nothing was said about

the bed. Lean says that about a week after this Huston came to his shop and said to him : " Since I have been working at your bed I have some ideas of my own that I think would be an improvement, and I do not want to give them to you for nothing. How could I become interested with you?" and that he answered in the negative, saying that there were three of them in the thing already, and that they had ideas enough to put into it as they developed it. In March the parties, Lean and Huston, met again, when a settlement took place between them as to the work that Huston had done, whereby Lean gave Huston some lumber as compensation for the work. After this Lean was very ill for some time, so ill that it was scarcely expected that he would recover, and on or about the 7th of June after his recovery, having as he says, some business with Huston, he went to his, Huston's, shop on Queen street and there noticed a bed and wardrobe ready for sale, Lean says he asked Huston what he had there, and that Huston at first did not speak, and that he continued, saying: " Huston you have gone back on me at last," and that Huston then replied saying : " I told you that some one would run away with your ideas, if you did not hurry up." In regard to this interview, Huston says, " Lean was surprised and indignant when he saw my bed in my shop. He did not seem to know what it was." If he did not know what the article was it is strange that he should be surprised or indignant. Lean then went to the office of Mr. Ridout, a patent solicitor, and there ascertained that Huston had obtained a patent for a "combined wardrobe and bedstead." This patent was produced. It bears date the 3rd of March, 1884. The application for it was made on the 12th of February, 1884. Lean says that upon his making this discovery he commenced proceedings, and the action appeared to have been commenced on the 16th day of June 1884. The United States patent was for a "combined folding bed and wardrobe." No doubt the idea of an article of this kind arose from the American patent, and what as, I have said before, Lean employed Huston to do

was to make a model of the article patented by this patent, with certain improvements, which improvements were communicated by him to Huston when and after the American Patent was shown him, and all under the employment, and promise of secrecy.

[The learned Judge, after a careful analysis of the evidence, in which he found all the questions of fact in favour of the plaintiffs, and that there was really no substantial difference between the article patented by the defendant R. M. Huston and the one indicated to him by the plaintiff Thomas C. Lean, then proceeded]:

For the defence it was ingeniously and vigorously contended that the invention in the United States patent was not protected, and that, even if Lean did communicate to Huston his ideas comprehending an improvement or improvements upon that invention, these ideas, this improvement, or these improvements were not protected either because Lean had not nor had the plaintiffs any patent valid as a protection in this country, and that for these reasons, and because what was contained or embraced or comprehended in the United States' patent was, under the circumstances, public property, and not a secret, the defendant Huston was at perfect liberty, after promising, as an element of the contract of his employment, to make a model for the purpose of an application for a patent, to keep the whole matter secret until such time as a patent should be obtained, to hear Lean's whole story and description of his intended improvements, and examine the United States patent, which was, on the faith of his promise, handed to him by Lean, and then, after making the effort that he did make if he really and virtually made such an effort (which I doubt), turn around and make use of all the information for his own benefit. But I cannot think that the law is in such a condition as to permit this to be done, and I think the case to which I am about to refer is applicable to the subject, notwithstanding the argument that it is distinguishable, on the ground that what was there held

to be protected as against the defendant was in fact a secret. Lean's intended improvements were a secret. The intended application of these to the United States patent was a secret. The essence of that which he imparted to Huston was a secret. And even admitting the necessity of its being a secret, I see no difficulty, nor any room for the distinction sought to be made out.

The case *Morison v. Moat*, 9 Hare 241, seems to be an authority on the subject. A part of the head-note of that case is as follows: "An injunction granted to restrain the use of a secret in the compounding of a medicine, not being the subject of a patent, and to restrain the sale of such medicine by a defendant, who acquired a knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. A plaintiff, not having the privileges of a patentee may have no title to be protected in the exclusive manufacture and sale of a medicine against the world; but he may, notwithstanding, have a good title to protection against the particular defendant."

In delivering judgment the learned Vice-Chancellor said: "That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence,—meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." Further on, and after reviewing many of the authorities by which he considered himself bound, the learned Judge said: "It was much pressed in argument, on the part of the defendant, that the effect of granting an

injunction in such a case as the present would be to give the plaintiffs a better right than that of a patentee * But what we have to deal with here is, not the right of the plaintiffs against the world, but their right against the defendant. It may well be, that the plaintiffs have no title against the world in general, and may yet have a good title against the defendant."

Now I think I need not add more. After the best consideration I have been able to give the subject I do not entertain any doubt that the title of the plaintiffs is good as against the defendant Huston, and so far as I can at present see against the other defendants, although they may not have, or have not yet, a good title as against the public; and I think the plaintiffs are entitled to an order for the injunction they ask, and to their costs of the action, as well as the costs of the motion for the interim injunction.

The plaintiffs ask further relief by way of a declaration of a trust, an account, a delivery up of the manufactured articles for destruction, &c. I do not at present clearly see the way to these. I apprehend some difficulties in the way of granting them. I will at present state no reasons, but leave the matter open, so that counsel for the plaintiffs may, upon notice to the defendants, come before me and indicate the grounds for the other kinds of relief, if he choose so to do.

On this subject I will hear what may be urged, and also counsel for the parties, if defendants should see fit to contend that the defendants Huston Bros. are not liable for costs, &c.

G. A. B.

[CHANCERY DIVISION.]

RE COOKE AND DRIFIL.

Will—Devise—Estate—R. S. O. c. 109—Title.

R. C. by his will devised all his personal estate to his wife M. S. C. to be held for the interest of his son A. S. C. when he should have arrived at the age of 24 years; an annuity to his wife, M. S. C. for life; appointed her guardian to the son to take charge of all remaining money that should accrue from all sources: such money to be used for the necessary expenses of education etc., for the son. He desired that the wife should have control of all money coming to the son till he was of the age of 24 years, and at that time all rents and other property should come into his possession except the annuity. He further declared that at the death of the wife all rents, and all interests and all property should pass into the possession of the son, to be owned by him, his heirs and assigns forever. In case of the death of the wife before the son attained 24, another guardian with similar powers was appointed. In case of the death of the son before his mother, then all the property and rents, etc. were to be hers during her natural life, and after her death one half to go to the testator's relatives and the balance to the relatives of the wife, she making this disposition before her death; but if the son at the time of his death should leave a wife or children, then all property should be subject to such disposition as he should make at the time of his death.

In an application under the Vendors and Purchasers Act R. S. O. c. 109, for the opinion of the Court.

Held, that the will was sufficient to pass all the testator's property, including the land in question, that the interest taken by the son was a vested one, and was to come into his possession and control on his attaining 24, and following *Gairdner v. Gairdner*, 1 O. R. 191, that the son having attained that age the subsequent gift never could affect his interest which had become absolute.

If the lands passed by the will, the son and the widow joining as grantors, could convey such title as the testator had.

If the lands did not pass by the will, the son as heir at law, and the widow as to dower could make title.

THIS was an application under the Vendors and Purchasers Act, R. S. O. ch. 109, for the opinion of the Court upon the will of one Robert Cooke, which will was part of a chain of the title which had to be made to carry out a contract of sale made between the petitioners, Mary S. Cooke and Arthur S. Cooke, as vendors, and one Thomas Drifil, as purchaser.

The petition set out the contract of sale and the property, and then proceeded as follows:

"Difficulties have arisen in respect of the title to the said lands, whereby it has become necessary and expedient

to obtain the opinion of this Honorable Court as to the following questions :

" Whether under the will of one Robert Cooke, the father of the petitioner Arthur S. Cooke, your petitioner Arthur S. Cooke, in conjunction with the said Mary S. Cooke, has power to convey to the said Thomas Druffil an absolute estate in fee simple in the said lands, the said Arthur S. Cooke being now of the full age of twenty-four years, and unmarried."

The will in question provided as follows :

" I give and bequeath to my wife Mary S. Cooke all my household goods, together with all my books, and all debts that may be due or owing to me, and all interest in any bank or other stocks that may be held by me at the time of my decease : such stocks to be held for the interest of my son Arthur S. Cooke when he shall have arrived at the age of twenty-four years. I further bequeath to my wife Mary S. Cooke five hundred dollars per annum, to be paid to her quarterly from rents or from any other source arising out of any or all property left at my decease, such annuity to be paid during her natural life. * * I further appoint my wife Mary S. Cooke guardian to my son, Arthur S. Cooke, and to take charge of all remaining money that shall accrue from all sources : such money to be used for the necessary expenses of education, board and clothing for my son. * * And I further desire that my wife, Mary S. Cooke, shall have control of all money coming to my son, Arthur S. Cooke, till he is of the age of twenty-four years, and at that time all rents and other property shall come into his possession save and except five hundred dollars to be paid to my wife, Mary S. Cooke. I further declare that at the death of my wife, Mary S. Cooke, all rents and all interests and all property shall pass into the possession of my son, Arthur S. Cooke, to be owned by him, his heirs and assigns forever. If in case of the death of my wife, Mary S. Cooke, before my son, Arthur S. Cooke, arrives at the age of twenty-four years I appoint Robert Alexander, teacher, of Newmarket, to be guardian to my son in place of my wife, deceased, and to have all powers that were vested in her, such powers to be used for the interest of my son. * * I further declare that in case of the death of my son, Arthur S. Cooke, before his mother, then all the property and rents, with all interest

in banks, and all other stocks are to be hers during her natural life, and after her death it would be my desire that one-half go to my relatives and the balance to the relatives of my wife, she making the disposition of such property before her death; but if my son, Arthur S. Cooke, at the time of his death should leave a wife or children, then all property should be subject to such disposition as he should make at the time of his death."

It was admitted by both counsel that Arthur S. Cooke was of the full age of twenty-four years and unmarried.

The petition came on for argument on April 1st, 1885, before Ferguson, J.

T. J. Robertson, for the petitioners, the vendors. If the property passed under the will at all, the mother and son by joining in the conveyance can make a perfectly good title, as the gift over did not take effect unless the son died before his mother and under twenty-four years of age, and he having attained that age he takes absolutely, except as to the annuity to his mother, which she joining in the conveyance can release: *Gairdner v. Gairdner*, 1 O. R. 184. If the property did not pass under the will, then the son is the heir-at-law subject to his mother's dower, and both joining can still make a good title.

Masten, for the purchaser. I think the expression in the will, "all rents and other property shall come into his (the son's) possession," shews that the property did pass by the will; but if the son does take a fee simple it is subject to be divested by a subsequent clause in the will in case he dies before his mother, and that construction is aided by the clause at the end of the will that if he leaves a wife or child he can devise it by will, which would indicate that if he does not leave a wife or child that he cannot so devise it.

Robertson, in reply. The effect of the will is the same as if it had been worded thus: "I give all my property except the \$500 a year to my son Arthur when he attains twenty-four, and this I give to him on his mother's death; and should Arthur die under twenty-four, then I give all my property to my wife, his mother, if living, for her life,

with remainder to relatives, &c.; but should Arthur die under twenty-four, leaving a wife or child, then subject to such disposition as he may make," &c.

April 2, 1885. FERGUSON, J.—The clauses of the will that seem to be material for the purposes of what I have to consider are briefly, and in consecutive order, as follows: A gift of personal property of various kinds to the wife of the testator, to be held by her for the interest of the son, until he shall have arrived at the age of twenty-four years.

A gift of five hundred dollars per annum to be paid quarterly during her natural life, referring to the properties out of which this money is to be raised, and appointing her guardian of the son to take charge of all remaining moneys from all sources, the same to be used for the maintenance and education of the son.

The testator then expresses the desire that his wife shall have control of all money coming to the son until he is of the age of twenty-four years, and that at that time all rents and other property shall come into his possession save the five hundred dollars a year to be paid to his (the testator's) wife. He then declares that at the death of the wife all rents, interests, and property shall pass into possession of the son, to be owned by him, his heirs and assigns forever.

He then says that in case of the death of his wife before the son attains twenty-four years, he appoints a guardian of the son in place of the wife to have all powers that were given to her, such powers to be used for the interest of the son.

Then after making a gift to his adopted daughter, and providing for the payment of the amount, the testator says:

"I further declare that in case of the death of my son, Arthur S. Cooke, before his mother, then all the property and rents with all interest in banks and all other stocks are to be hers during her natural life, and after her death it would be my desire that one half go to my relatives, and

the balance to the relatives of my wife, she making the disposition of such property before her death; but if my son, Arthur S. Cooke, at the time of his death should leave a wife or children, then all property should be subject to such disposition as he should make at the time of his death."

It is upon this clause of the will that, according to the argument of counsel for the purchaser, the difficulty arises, he contending that it creates an executory devise, that upon the happening of the events mentioned will spring up of its own inherent strength, &c.

Counsel for the petitioner, however, contends that the meaning of the will, so far as is material, is, as if it had been expressed as follows, namely : I give all my property (except the \$500 a year) to my son, he to come into possession when he attains the age of twenty-four years, and this \$500, or the property out of which it is to be raised, I give to him upon his mother's death. Should Arthur my son, however, die under the age of twenty-four years, his mother then living, and he leaving no wife or child, then I give all the property to my wife to go to her for her life, and upon her death to be divided between her relatives and mine, one half to each, &c.; but should my son die under twenty-four years of age leaving a wife or child, then the property to be subject to such disposition as he may make, &c.

The property which is the subject of the contract of purchase and sale is not mentioned or described in the will at all, and it was a question whether it passed by the will or not. If it were clear that it did not pass by the will, it was argued that there would be no difficulty, because the son is an only child, and he as sole heir-at-law and his mother the widow of the testator propose to join as grantors in the conveyance to the intending purchaser, and in such case counsel agree in saying that a good title would pass, if the testator had a good title.

The case is then to be considered as if the lands in question did pass under the will unless it is clear that they did not, and I think this by no means clear, for I think they

did so pass. I think the language sufficiently comprehensive to embrace all the property of the testator, and I think the intention to dispose of all his property appears by the will.

The testator's son Arthur Cooke is now of an age over twenty-four years and unmarried.

The interest taken by the son was, I think, a vested interest, and was to come into possession (except as to the \$500 a year to his mother) upon his attaining the age of twenty-four years. I think this is plainly expressed on the face of the will, and if it were not I think the intention of the testator to be gathered from the will is clearly to this effect; and there is nothing whatever showing or tending to shew that the son was not to have absolute control at and after the time of his coming into possession.

Then I think the rule or law of construction referred to and apparently acted on by my Brother Proudfoot in the case *Gairdner v. Gairdner*, 1 O. R. at p. 191, applies. The learned Judge stated it in this way: "When a legatee, and the same rule must apply to a devisee, is to have the absolute control at a specified time, a subsequent gift over will be limited to take effect before the time." Other authorities on the subject are there referred to. Then this rule applying, and the son having attained the age of twenty-four years and come into possession and absolute control, the subsequent gift over, which has been the cause of the doubt and contention here, cannot, in my opinion, affect his estate or interest which I think has become absolute.

The moneys directed to be paid to the testator's adopted daughter have, I apprehend, been paid. Nothing was said about these moneys upon the argument of the petition.

My conclusion then is, that if it is assumed that the lands, the subject of the contract mentioned in the petition, did pass under the will of the testator, the son and the widow joining as grantors in a conveyance can make a good title to the purchaser, if it is also assumed that the testator had a good title to the same lands. I think that they can convey such a title as the testator had at the time of his death.

If, on the other hand, it be assumed that the lands did not pass under the will, counsel agree in saying that the son, the sole heir-at-law, and the widow so joining can convey title as above. I am of the opinion that a good title can be passed to the intending purchaser in the way proposed, if the testator had a good title.

The petitioner should have the costs of and incidental to the petition against the intending purchaser: *Osborne v. Rowlett*, 13 Ch. D. at p. 798; *Givins v. Darvill*, 27 Gr. at p. 507; *In re Mercer & Moore*, 14 Ch. D. at p. 296.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

RE COULTER ET AL. AND SMITH.

Vendors and Purchasers Act—R. S. O. ch. 109—Absent husband—Wife's conveyance.

J. H. by his will dated April 14th, 1874, devised certain property to his daughter, M. A. J., for life, with remainder to her children, and died soon after making the will. M. A. J. died about 1880, leaving five children, the youngest of whom came of age in 1884. Before the death of J. H., one of the children, M. J. J. married one C., and C. in 1870 deserted his wife and had not been heard of afterwards.

Held, that M. J. C. could convey her interest in the property, without the concurrence of her husband.

THIS was an application under the Vendors and Purchasers Act, R. S. O. c. 109.

The petition was filed by Ebenezer Smith, and set out that Joseph Holley, by his will, gave a life estate in the property in question to his daughter Mary Ann Johnson, with remainder in fee to her children, with one exception; that his will was dated the 14th April, 1874, and that he died shortly after the making thereof: that the said Mary Ann Johnson died about the year 1880, leaving her surviving Annie Coulter and four other children her heirs and

heiresses-at-law, the youngest of whom came of age in May, 1884: that before the death of the said Joseph Holley one of the said children, Mary Jane Johnston, intermarried with and became the wife of one Caines, and the said Caines in the year 1870 deserted his wife the said Mary J. Caines, and had not since been heard of, and it was impossible to obtain the signature of the said Caines to the deed to the petitioner, who was the purchaser of the said property.

The principal question to be decided on the application was: Could the said married woman, Mary J. Caines, convey her interest in the property without the concurrence of her husband?

The petition came on for argument on the 30th day of April, 1885, before Ferguson, J.

W. M. Hall, for the purchaser, who petitions. The wife cannot make a valid conveyance without the concurrence of her husband under the Married Woman's Act of 1884, though sect. 2, sub-sects. 1 and 2 give to married women ample powers to deal with all kinds of property, and makes her responsible for her contracts yet sects. 3 and 5 appear to control the general application of sect. 1 sub-sects. 1 and 2. Sect. 5 applies to women married before the said Act came into force, and states she can convey in the manner aforesaid property acquired after the passing of the Act. See English Married Woman's Property Act of 1882 (45 & 46 Vict. c. 75.); *Baynton v. Collins*, 27 Ch. D. 604; *Re Thompson v. Curzon*, W. N. of 1885, p. 60. Section 22 of the Act of 1884, repeals the Act of 1873, R. S. O. ch. 127, so far as that Act restricted a married woman from conveying her real estate without her husband's consent, but the repeal of such part of the said Act as did not affect the property of married women acquired before the passing of the Act of 1884, and the said part of the Act of 1873 is not repealed by section 22 of the Act of 1884 as to real estate acquired by a married woman before 1884.

C. L. Ferguson, for the vendors. One of the most important incidents of separate estate is the right to convey without the concurrence of the husband. This incident is necessarily attached to separate estate unless it be taken away by positive statutory enactment: *Adams v. Loomis*, 24 Gr. 242. R. S. O. c. 127, sec. 3, rendered it necessary that the husband should join merely to show concurrence, his signature is only the performance of a manual act—a mere formality; he does not thereby part with any estate, interest, or right in lands of the wife: *Furnes v. Mitchell*, 3 A. R. 510; *Ingram v. Taylor*, 7 A. R. 216. 47 Vict. ch. 19, sec. 22, O., repealing the latter part of sec. 3 of ch. 127, R. S. O. expressly does away with the necessity for the husband's signature and the rights which married woman possessed previous to its passing are very largely increased. This Act applies to all lands of a married woman whenever acquired, notwithstanding sec. 5 of said Act. It would be impossible to enforce the rights given to a married woman under sub-s. 3 of s. 2 of 47 Vict., c. 19 O. if the concurrence of the husband were still necessary. The husband having abandoned his wife, and having been continuously absent and unheard of for more than fourteen years, *prima facie* he is dead: *Best on Evidence*, 7th ed. 375. *Best on Presumptions*, 190.

April 30, 1885. FERGUSON, J.—I am of the opinion that the married woman, Mrs. Caines, has the power to convey without her husband joining, and I direct that the order to be made herein shall contain a declaration to that effect, and that a conveyance to the petitioner signed by her shall have the same effect, as far as the title is concerned, as if the husband had been a party to the deed.

G. A. B.

[CHANCERY DIVISION]

LONDON AND CANADA LOAN AND AGENCY COMPANY
v. WALLACE ET AL.

*Will—Charge of debts—Carrying on business—Mortgage by executors—
R. S.O. ch. 107, secs 7, 17, 20.*

A testator charged his real estate with payment of his debts, which he directed to be paid thereout as soon as possible, and then devised it to his executors and trustees on trust to sell as soon as they should think prudent, and invest the proceeds and pay an annuity to his widow until sale, and after the sale, invest a sum named, from which to give her a specific annuity, and distribute the proceeds among his family; and proceeded: "Until sold as aforesaid, I direct that my trustees keep my schooners employed for freight and hire as far as possible, and for such purpose to engage all necessary assistants, and keep the said vessels in repair; and may store grain and other goods and merchandise in my warehouse for hire or storage, and may take such action as they think advisable to work and develop my interest in the B. gold mine, but the outlay by them shall not at anytime exceed \$1000."

The trustees became indebted to a bank for certain expenses incurred in connection with the schooners and repairs to them; and in connection with the warehouse, and to meet this indebtedness, executed a mortgage of the real estate to the plaintiffs who now brought this action for foreclosure. The testator's debts had all been paid before the execution of the mortgage, but there was no evidence that the plaintiffs knew more as to the purpose for which the money was required, than that it was to pay a debt due at the bank by the estate.

Held, reversing the judgment of FERGUSON, J., that the plaintiff were entitled to the usual mortgage judgment, for there was no sufficient evidence of notice to them that the money was not to be expended in conformity with the will.

THIS was a suit brought by the London and Canadian Loan and Agency Company, (Limited,) against Jane Wallace, William B. Wallace, Robert G. Wallace, G. F. Hall, James Hadden, and Richard O'Neill, praying payment of what was due under a certain mortgage, or in default foreclosure, an order for possession, all necessary enquiries, and general relief.

The first three defendants above named were the executors and trustees under the will of Robert Wallace, deceased, the last three were tenants of the mortgaged property.

The rest of the facts of the case sufficiently appear in the judgment. The bill was taken *pro confesso* as against the defendants Hall, Hadden, and O'Neill.

The action was tried at Toronto, on November 18th and 20th, 1881, before Ferguson, J.

F. Arnoldi, for the plaintiffs. R. S. O. ch. 107, sec. 17, applies to raising money for carrying on the business pursuant to the will, as much as to a case where money has to be raised to pay debts in the ordinary sense of the word "debts." I refer also to sec. 20. There was, therefore, power to mortgage; the plaintiffs hold the mortgage, and that ends the matter. The plaintiffs had no notice of any *devastavit*. Ward was not in the position of an agent. On this point of the case, I refer to *Dart on Vend. and Purch.*, 5th ed., pp. 70, 618; *Shallcross v. Wright*, 12 Beav. 505; *Clifford v. Lewis*, 6 Mad. 33; *Sabin v. Heape*, 27 Beav. 553; *Stronghill v. Anstey*, 1 DeG. M. & G. 635; *Ball v. Harris*, 4 M. & Cr. 264; *Wms. on Ex.* 6th. ed., p. 621; *Lewin on Trustees*, 7th ed., pp. 391 414; *Corser v. Cartwright*, L. R. 8 Ch. 971, 7 H. L. 731; *Eland v. Eland*, 4 M. & Cr. 420; Imp. 22-23 Vic. ch. 35, sec. 14; *Fisher on Mortg.*, 3rd ed., p. 576. When the testator directed the carrying on of the business, he must have impliedly authorized the employment of enough of his estate to carry out that direction. See *Smith v. Smith*, 13 Gr. 81; *McNeillie v. Acton*, 4 DeG. M. & G. 744; *Ex parte Garland*, 10 Ves. 110; *Cutbush v. Cutbush*, 1 Beav. 184; *Fisher on Mortgages*, 3rd ed., p. 285, sec. 421.

C. Moss, Q. C., for the executors and trustees. R. S. O. ch. 107 does not apply here. There is an express provision made for the payment of the debts and charges, and this puts the statute out of the question altogether; *Thomas v. Bretnell*, 2 Ves. sen. 313; *Palmer v. Graves*, 1 Keen 545; *Nowlan v. Logie*, 7 Gr. 88. When there is a power to sell, with the intention to convert absolutely, as here, there is no power to mortgage; *Lewin on Trusts*, 7th ed., p. 391. The charge of debts does not cover any charge incurred by the executors in carrying on the business after the testator's death: *In re Morgan*, *Pillgrem v. Pillgrem*, 18 Ch. D 93. The rule is that unless it can be shewn that the

testator intended that more property might be put into the business than was already in it, no more can be put in. If section 17 of R. S. O. ch. 107, does not apply, neither does section 20. Besides, in any event the mortgage was not made for proper purposes, for the executors should have sold the property long before the time of the mortgage. A reasonable time had elapsed for the sale before the plaintiffs dealt with the executors, and so the plaintiffs are at fault: *Stronghill v. Anstey*, 1 DeG. M. & G. 635; *Devaynes v. Robinson*, 24 Beav. 86. The plaintiffs had notice that the money was not for the payment of the debts through Ward, their agent: *Evans on Prin. & Agent*, 164, 165. I also refer to *In re Johnson, Shearman v. Robinson*, 15 Ch. D. 548; *Mills v. Cottle*, 17 Gr. 335; *Ewart v. Steven*, 16 Gr. 198, S. C. in App. 18 Gr. 35; *McKellar v. Prangley*, 25 Gr. 545; *Lovell v. Gibson*, 19 Gr. 280.

F. Arnoldi, in reply, cited *English v. English*, 12 Gr. 441; *Elliott v. Merryman*, W. & Tud. L. C., 5th ed., vol. i. p. 64; *R. S. O. ch. 107*, sec. 7; *Fisher on Mortgages*, 3rd ed., p. 283, sec. 417; *Wade on Notice*, p. 304 seq.

March 4th, 1884. FERGUSON, J.—The suit is for foreclosure of a mortgage made by the executors and trustees of the last will of the late Robert Wallace upon certain lands belonging to his estate. The debts of the testator were all paid before the making of the mortgage.

The testator, after giving his household furniture and the dwelling house and a small lot of land on which it was situate to his wife, gave all his other real and personal estate and also that given to his wife, should she not survive him, to the executors and trustees (who were his wife and two of her sons) in trust to sell in the manner pointed out by the will, and to invest the proceeds in such securities as they might think proper, &c. The will directs the payment of a yearly sum to the widow of the testator until such time as the property should be sold, and after the sale the investment of the sum of \$20,000 for the pur-

pose of yielding as interest an income of \$1,200 a year for his widow, and also directs a distribution of the proceeds of his estate amongst his family in a way not at all unusual or extraordinary. It appears from the will that the testator was the owner of some vessels and a warehouse as well as an interest in a mine (a).

(a) By his said will, which bore date January 28th, 1870, the testator charged his real estate, including the mortgaged lands in question, with payment of his debts, and then devised them so charged to the trustees as above mentioned, but without making any provision for raising such debts out of the said estate.

The will contains this clause :

"And until sold as aforesaid I direct that my trustees keep my schooners employed for freight and hire as far as possible, and for such purpose to engage all necessary assistants and keep the said vessels in repair, and make such repairs and improvements to the "Garibaldi" as they think prudent, and may store grain and other goods and merchandise in my warehouse for hire or storage, and may take such action as they think advisable in common with other joint proprietors to work and develop my interest in the mine known as "The Barry Gold Mine," but the outlay by them shall not at any time exceed one thousand dollars."

Except this liberty to employ a sum not exceeding \$1,000 in the development of the gold mine, there is no authority given by the will to employ any part of the estate in carrying on the business beyond what was embarked in it at the time of his death.

The trustees carried on the business of the schooners and, as I understand, of the warehouse, and made certain repairs to the vessels that appear to have been of a somewhat costly character, and by so doing became indebted to the Ontario Bank, and for the purpose of meeting or paying this indebtedness, contracted by themselves in carrying on the business as authorized by the will, they made the mortgage in question upon the real estate, or a part of it, for the sum of \$4,000. The estate does not appear to

have been charged by the will with any sum excepting the debts, which, as I have said, were all paid before the mention of the mortgage.

I think the evidence sufficient to show that as a matter of law the plaintiffs are affected with notice of the purposes for which the money borrowed upon the mortgage was required, namely :—to pay a debt incurred to the bank by the executors and trustees in carrying on the business of the estate. I do not think the plaintiffs themselves had knowledge of this fact before the taking of the mortgage and advancing of the money upon it, but I think it sufficiently shown that Mr. Ward was an agent of the plaintiffs, and the evidence given by him and that given by Mr. B. Wallace do, I think, show that he had notice of the fact. This question of notice or not may not be so material as was apparently thought at the time of the trial of the action.

With the best consideration I have been able to give the subject I am of the opinion that sections 7, 17, and 20, of the Act, R. S. O. ch. 107, have not, nor has any of them any application to the case.

In *Smith v. Smith*, 13 Gr. 81, the facts were much like the facts in the present case. The direction in that case was, that the testator's wife as his executrix for that purpose should continue and carry on the business with the surviving members of the firm, she to hold the same share and interest in the business as the testator did, and the business was to be carried on for the benefit of the testator's wife and family under her care and charge. One of the mortgages in that case was given to one Cradock for money to carry on the business. The other was to the defendant Fisken to secure a running account of Ross Mitchell & Fisken for goods furnished theretofore and to be furnished by the firm for carrying on the business, Cradock's mortgage having been assigned to Fisken. All the debts due by the testator and his firm had been paid before these mortgages were given. It was there contended that the will gave power to the trustee to sell or

mortgage the testator's real estate if it should be deemed expedient to provide funds for carrying on the business, but it was held that the case *McNeillie v. Acton*, 4 DeG. M. & G. 744, was a direct authority against the contention. The learned Judge said: "A sale or mortgage for such purpose would be a breach of trust," and he further said: "All that a will which directs the testator's business to be carried on authorizes executors to do is to continue in it so much of the testator's estate as may be in it at the time of his death." It was held that the mortgages did not affect the plaintiffs' interests in the mortgaged premises. A sale of the property was directed, and payment to the plaintiffs of their shares ordered, the shares of the beneficiaries who executed their mortgage to be paid to the mortgagee.

A large number of authorities were referred to by counsel, and after having examined them with some care and anxiety I am of the opinion that the mortgage in question in this suit cannot be upheld as a charge upon the property. At the close of the argument, which was an elaborate one, it was conceded by counsel that in case the defence succeeded the bill should be dismissed, except that there should be a personal order against the executors to pay the mortgage money.

There will be a declaration that the trustees and executors had not, under the circumstances disclosed, power and authority to execute the mortgage in question, and that the said mortgage is not a charge upon the property of the testator mentioned and described in it. And there will be an order against the persons who executed the mortgage viz: Jane Wallace, W. B. Wallace, and Robert G. Wallace, but not as executors, to pay to the plaintiffs the amount mentioned in the mortgage, and interest, or such part of the same as may be due and payable and remaining unpaid.

As to the cost of the litigation, the case is a very great hardship on the plaintiffs, who, though as I think affected with notice, had not actual knowledge of the facts. The defendants seem not to act, or desire to act, in

a strictly honourable way so far as I can judge by the answers and the testimony of the one who appeared as a witness. By depriving the defendants of the costs I may be taking the amount of the costs away from other parties in the administration suit (*a*). I do not know how that may turn out to be, but all things considered I think there should be no costs of the suit or of the motion, the costs of which were reserved to be disposed of at the hearing (*b*). There will be no costs of either one or the other to either party.

On September 6th, 1884, the plaintiff moved by way of appeal before the Divisional Court.

F. Arnoldi, for the plaintiffs, besides the authorities cited in the Court below, referred to *Colyer v. Finch*, 5 H. L. 905; *Sugden on Vend. and Purch.*, 13th ed., 544; *Forbes v. Peacock*, 1 Ph. 717; *Sabin v. Heape*, 27 Beav. 553; *Shaw v. Borrer*, 1 Keen 559; *Dart on Vend. and Purch.*, 5th ed., p. 870; *Fisher on Mortg.*, 4th ed., sec. 426; *Wyllie v. Rollen*, 32 L. J. Ch. 782; *Erb v. Great Western R. W. Co.*, 5 S. C. R. 179.

(*a*) As set up in the answer of the executors and trustees, a bill of complaint for the administration of the estate of Robert Wallace had been filed before the filing of the bill in the present suit, and by decree dated November 13th, 1878, there was a reference directed to the Master at Cobourg to take the usual accounts, and under an order made in that suit a receiver was appointed of the estate (prior to the filing of the bill in this action). And the defendants alleged that in answer to an advertisement for creditors of the estate, the present plaintiffs sent in their claim to the Master, and that the said suit was still pending, and they submitted the plaintiffs ought to have proceeded to establish their claim in that suit, and this suit was wholly unnecessary, and in any event the plaintiffs ought not to be allowed to burden the estate with the costs of this suit; and that the receiver was in possession of the mortgaged lands by his tenants, who were the three defendants in this action, other than the executors and trustees.

(*b*) This referred to the costs of and incidental to a certain order dated December 20th, 1880, made on the petition of the present plaintiffs, ordering that the petitioners might proceed with this action notwithstanding the appointment of the receiver in the administration suit: that the petitioners should pay to the said receiver his costs of this application, forthwith after taxation thereof; and that the question of the petitioners' right to repayment in this suit of the costs so ordered to be paid by them, and their own costs of the petition, together with the question of their right to any costs in this suit, should be reserved until the hearing thereof.

C. Moss, Q. C., for the defendant, besides authorities cited in the Court below, referred to *Jarman* on Wills, 4th ed., vol. 2, p. 591; *Bloomer v. Waldron*, 3 Hill N. Y. 360; *Huldenby v. Spofforth*, 1 Beav. 390; *Page v. Cooper*, 16 Beav. 396; *Wheeler v. Claydon*. *ib.* 169; *Ferry v. Laible*, 31 N. J. Eq. 566.

December 18th, 1884. BOYD, C.—It is not disputed that the land is devised to the trustees. The Judge of first instance has correctly found that the testator charges all his estate with the payment of debts, but does not deal further with that aspect of the case, because as a matter of fact all the debts had been paid. He finds a misapplication of the money advanced upon the security of the mortgage, and that with the knowledge of the plaintiffs, and so he invalidates the mortgage. As I read the evidence, the knowledge of the plaintiffs depends entirely upon what was communicated to Mr. Ward, who, it may be conceded, was the agent of the company. Mr. Ward knew nothing of the matter personally, *i. e.*, as to the state or condition of the assets and estate in the hands of the defendants, the executors. What was told him as to the purpose for which the loan was made, was, that the money was required to pay something that was due at the bank by the estate, but beyond this he was told nothing. This does not necessarily or even primarily imply that the money was required for an improper purpose; I mean one not within the scope of the executor's powers and duties. Unless there be satisfactorily proved the fact that unequivocal information of an intended misapplication of the money was communicated to the agent of the company, I am not disposed to extend the doctrine of constructive notice so as to invalidate this security in the hands of the defendants. With all due deference to the views expressed by Mr. Justice Ferguson, I find myself unable, upon the evidence as laid before me, to come to the same conclusion as he does. As I read the testimony, it is quite insufficient to affect the company through their agent with notice that

the money was not to be applied in conformity with the provisions of the will. To my mind that disposes of the whole action. In *Re Tanqueray Willaume and Landau*, 20 Ch. D. at p. 482, the law is thus explained by Brett, L. J., "Wherever a testator devises all his real estate to his executors and directs them to pay his debts, the debts are charged on the real estate, whatever may be the trusts declared of that real estate, unless upon the whole will you can clearly find a contrary intention." That case also decides that such a delay as here occurred after the death, that is six years, raises no presumption that all the debts have been paid. The purchaser is not bound to inquire upon this matter, unless there has been a delay of twenty years. Within that limit, when there is a charge of debts with an implied power to sell or mortgage, and the purchaser gets the legal estate, he is protected in equity, whether there are debts or not, unless he has knowledge that there are no such debts. See also *Coaser v. Cartwright*, L. R. 7 H. L. 731; *Ball v. Harris*, 4 M. & Cr. 267.

As I construe the will I find no contrary intention clearly expressed therein. The charge of debts in the first paragraph does not give an implied power to mortgage or sell co-extensive with the express trust to sell afterwards set forth in the will. The first direction is, that the executors shall pay his debts out of his estate "so soon as possible" after his decease. The express trust to sell is so soon as the executors in their discretion shall think prudent. There is also a further charge of an annuity to his wife upon his estate devised to the executors, which is directed to be paid after his death by quarterly payments in advance. Moneys to meet this charge would require to be procured forthwith, and this provision clearly indicates that the executors could by implication mortgage for that purpose long before they could be required to sell the corpus of the estate under the express trust.

That part of the will which directs the trustees after sale of the property to invest and distribute "after provid-

ing for the payments hereinbefore directed," may well refer not to debts but to the expenses incurred in keeping the schooners employed, and for repairs and improvements, and for outlay on the Barry mine, and for salary to his son; all which are set forth in the will as payments to be made out of the proceeds of sale. I do not read this paragraph of the will as affording any clear manifestation of the testator's intention that the payment of debts was to be postponed until the executors should in their discretion think prudent to sell the real estate.

The judgment should be reversed, and the usual mortgage judgment pronounced instead, with all costs to the plaintiffs.

PROUDFOOT, J.—The case of *Ewart v. Gordon*, 13 Gr. 40, decides that executors have power to pledge the assets of the estate as security for advances made to the executors; and the transaction being free from bad faith or fraud on the part of the lender, he can hold the pledge, whatever the executors do with the money. In that case the suit was by the surviving executor, seeking to rescind a pledge made by the deceased, who had been the acting executor.

In the present instance the executors are defendants, but ask the Court to set aside the security given by themselves, on the ground that they had exceeded their powers; that the money was misapplied; and that the plaintiffs had notice of it.

I think the evidence fails to establish notice to Mr. Ward of the misapplication of the money, and the only notice suggested is that to him. The case is then brought entirely within the principle acted on in *Ewart v. Gordon*, which was itself based upon that of *McLeod v. Drummond*, 17 Ves. 152.

In other respects I agree with the opinion expressed by the Chancellor.

A. H. F. L.

[CHANCERY DIVISION.]

BROOKS V. CONLEY ET AL. (a)

Jurisdiction—Declaratory judgment—Verbal agreement—Action to have same expressed in writing.

The plaintiff set up a verbal agreement made in 1873, between himself and the defendant C., they being adjoining proprietors of land, to the effect that C. should build a house with its southern wall encroaching nine inches upon the plaintiff's land, and the plaintiff should be allowed at any time to use that wall as a party wall upon payment of half the expenses of its original erection by C.; and the plaintiff alleged that shortly afterwards C. erected his building as agreed upon, and the plaintiff claimed to have the agreement put into writing, and executed by C., so as to enable him to register it; and he asked a judgment declaring him entitled to all the rights and privileges contained in the verbal agreement. C. in his pleadings conceded the rights and privileges demanded by the plaintiff under the agreement.

Held, nevertheless, affirming the decision of FERGUSON, J., that the action must be dismissed, for there is no jurisdiction to ascertain and declare rights before a party interested has actually sustained damage.

THIS was an action brought by George M. Brooks against George Conley, Thomas Cross, and Edmund D. O'Flynn, to establish his rights in respect of certain lands under an agreement made by him with the defendant Cross.

The plaintiff set up in his statement of claim that in the year 1873 he was, and still remained the owner in fee simple of the northern portions of the south halves of certain lots in the village of Madoc: that the defendant Cross was in the year 1873 the owner in fee simple of the northern halves of the said lots: that while he and Cross were owners of the said lands, and in the year 1873, Cross began to build upon the northern halves of the said lots a certain building now standing partly upon the said north halves of said lots and known as the Windsor house.

The plaintiff then alleged in the fourth paragraph of his statement of claim as follows:

The said plaintiff and the said defendant Thomas Cross entered into a verbal agreement at or about that time in reference to the location or position of said building, which agreement was as follows, that is to say, the said defendant Thomas Cross was to build the said building then

(a) See 48 Vic. c. 13, O., s. 5.

about to be erected and now known as the Windsor House, in such a position that the southern wall thereof would extend nine inches south of the boundary line between the north and south halves of said lots, and which said nine inches of land was then and still is owned by the said plaintiff; and the said plaintiff, in consideration of allowing the said building to be placed nine inches upon his land as aforesaid, was to have the privilege at any time of using the said southern wall of the said building as the northern wall or walls of such building or buildings as he, the said plaintiff, should at any time erect upon the said northern portions of the south halves of the said lots, upon payment of one half of the actual costs and expenses of building the said southern wall of the said building now known as the Windsor House, before using the same for such building purposes, and with the right, privilege, and power to the said plaintiff of erecting his building or buildings upon the northern portions of said south half of said lots to any height he saw fit, and in the course of such erection to have the privilege and power of closing and blocking up any and all windows in the said southern wall of said building then proposed to be erected by the said defendant Cross, which might become necessary to be closed by reason of the plaintiff using the said wall for building purposes.

The plaintiff then went on to allege that Cross shortly afterwards completed the Windsor House building, which he placed nine inches south of the dividing line between the north and south halves of the lots, and to that extent on his the plaintiff's lands, in pursuance of the above verbal agreement: that subsequently Cross conveyed his land to the defendant O'Flynn in trust for the benefit of his creditors: that O'Flynn afterwards leased the same with the Windsor House to the defendant Conley, and covenanted in the lease to sell and convey the lands so leased free from incumbrances to Conley on January 1st, 1884, for the price therein mentioned, and Conley similarly agreed to purchase the same for the said price: that Cross and his assigns and privies in estate, the defendants, had from the time of the first erection of the Windsor House been in the occupation and possession thereof, including the said nine inches: that prior to commencing this action he, the plaintiff, caused a written document to be drawn up setting out in detail the above verbal agreement, and caused it to be presented to O'Flynn for signature and execution, but O'Flynn refused to execute it or to give a written acknowledgment of any kind of the plaintiff's

right to use the southern wall of the Windsor House in accordance with the verbal agreement: that Conley also refused to execute such a document. And he submitted that there had been part performance of the agreement, and that he was entitled to have it specifically performed, and an instrument in pursuance thereof duly signed for the purposes of registration. He, therefore, prayed for a judgment or order from the Court against the defendants entitling him to all the rights, privileges, and benefits contained in the verbal agreement made between himself and Cross, and to establish his right to use the said southern wall of the Windsor House for the northern wall of such building or buildings as he might thereafter erect upon the northern portion of the south halves of the said lots; or, in the alternative, for the possession of that part of the northern portion of the said lots at present covered by the Windsor House; and for further relief and costs of action.

For the purposes of this report it is sufficient to say that in their joint statement of defence the defendants alleged that they did not object nor had ever objected or refused to suffer or permit the plaintiff to build on or against the south wall of the Windsor House, or any part thereof, but, on the contrary thereof, had always acquiesced in and conceded the plaintiff's right to build on and against the said wall as a party wall on payment of the actual cost of nine inches thereof.

The action was tried at Belleville, on March 26th, 1884, before Ferguson J.

Dickson Q. C., and Clute, for the plaintiff.

Dougall, Q. C., for the defendants.

His Lordship delivered the following oral judgment:

March 26th, 1884. FERGUSON, J.—The agreement alleged by the plaintiff was proved; it was not denied by the defendants here, nor was it denied on the record; it was not admitted, it is true, on the record, but it was not denied.

While that is proved, it is also proved that the defendants never refused the plaintiff permission to do what according to the agreement he had the right to do. I think it appears that each of them was always, from time to time, ready and willing to permit the plaintiff to use the wall in the way indicated by the agreement.

The suit is brought for the declaration of a right, for a declaratory decree. A suit will only lie for such a decree or such a declaration of right when there is consequential relief either asked in the suit or that might have been asked in the suit. No consequential relief is asked here, and it is not pointed out there is any that might have been asked; alternative relief is asked by way of ejectment, but that is not consequential relief; so that I think the suit cannot be maintained for the judgment that is asked. A provision on the subject is found in one of the general orders of the former Court of Chancery, I think No. 538; but since the passing of that order there is a number of cases in our own Court, as many as five, I think, stating that an action or suit only lies for a declaratory decree or judgment when there is consequential relief asked, or that might have been asked by the plaintiff. Towards the close of the argument Mr. Dickson put the case on this footing, that it was to be looked at in the nature of a contract either for the purchase of what the plaintiff claims as his right from the defendant Cross, the party then being the owner, or as an exchange of one thing for another—that is, the exchange of the nine inches of land given by the plaintiff for the use of the wall built upon it by the defendant Cross, for the right that he claims under the agreement; and it was endeavored to put the case in the position of one for specific performance of that agreement. Now it is true that a parol contract partly performed for the purchase or sale of an easement, a right over or upon any land, can be specifically performed by the Court in the same way as a parol agreement for the purchase or sale of land. That is laid down in the judgment of the late lamented Chief Justice

Moss, in *Craig v. Craig*, 2 A. R. 583, adopting the view of Mr. Justice Proudfoot in that part of the case.

So that if the plaintiff stood in the position of being the purchaser of an easement—and there are some rights relative to party walls that are easements or in the nature of easements—if plaintiff stood in the position of a purchaser, or one who was to receive this right in exchange for land or other property, he would have some ground for his contention that his suit was in the nature of, or could be changed into one for specific performance, and then ask an amendment of his record so as to meet the case.

If I thought that case could be sustained I would at once allow an amendment of the record, because I do not see that the defendant would be at all injured by it. At present I think the suit cannot be sustained in that form. It appears to me that the parties did not intend to leave and did not leave the matter in *fieri*; that what they did was a concluded bargain; there was no agreement for a subsequent conveyance. I do not think it is so in the nature of a purchase and sale that the common rule applies that it is understood there is to be a subsequent conveyance or a conveyance as a consummation of the contract made by the parties. They made their verbal agreement, they went on upon the verbal agreement: there is nothing to indicate what is always the case in the purchase and sale of land, that there is to be a consummation of the contract or agreement afterwards: they rely for years and years upon the verbal agreement alone: one party acted upon it, I assume, and the other party might at any time during the long period of nine or ten years have acted upon it, and never until he seems to have been awakened by the idea of the running of the statute has he professed to say that the verbal agreement made was not final in itself. At present I do not think that the suit can be sustained in that view.

I think the plaintiff's action must be dismissed, with costs. The suit cannot be maintained, upon the evidence;

but having some doubts I think it a proper case to stay the proceedings, so that the plaintiff may, if he is so advised, move before the Divisional Court; the stay will be only necessary to prevent the defendant from enforcing payment of costs.

The plaintiff afterwards moved by way of appeal before the Divisional Court, on the 12th day of September, 1884.

Dickson, Q. C., for the plaintiff. We made a bargain to use nine inches of the wall, which lies only in grant, and we should have the bargain specifically performed, and have proper conveyances executed. The document was tendered for execution and refused, and we should get the costs of the action. We are not willing to pay for the wall now, until we seek to use it. It is necessary for us to obtain a declaration of our rights, in order to prevent the defendant acquiring title by the lapse of ten years. This is in the nature of a proceeding by bill *quia timet*. He referred to *Holmested's Chy.* O. p. 326; *Macklem v. Cummings*, 7 Gr. 318; *Cox v. Barker*, 3 Ch. D. 359; *Craig v. Craig*, 24 Gr. 573; *S. C. in Appeal*, 2 A. R. 583; *Sproule v. Strafford*, 1 O. R. 335; *Corbett v. Harper*, 5 O. R. 93; *Brooke v. McLean*, *Ib.* 209; *Tiffany on Registration*, pp. 110, 205; *Registry Act*, ch. 111, sec. 44; *Bonner v. Great Western R. W. Co.*, 24 Ch. D. 1; *Hervey v. Smith*, 22 Beav. 299; *Culverwell v. Lockington*, 24 C. P. 611; *Matts v. Hawkins*, 5 Taunt. 20; *Weston v. Arnold*, L. R. 8 Chy. 1084; *Cubitt v. Porter*, 8 B. & C. 257.

Dougall, Q.C., for the defendants. The verbal agreement is admitted, and we have neither done any wrong nor intend any. The action should be dismissed, with costs.

December 18th, 1884. *BOYD, C.*—The agreement set forth in the fourth paragraph of the plaintiff's claim is not disputed. It is to this effect: The plaintiff and defendant Cross, being adjoining proprietors of land, it was

agreed that Cross should build a house in such a position that the southern wall would encroach nine inches upon the plaintiff's land, and the plaintiff was to be allowed at any time to use that wall as a party wall upon payment of one-half the expenses of its original erection by Cross. This agreement was verbal and was made in 1873, and shortly afterwards Cross erected his building as agreed upon. Some years afterwards Cross assigned all his property in trust for creditors to the defendant O'Flynn, and O'Flynn leased the building in question to the defendant Conley. This action was begun before the expiration of ten years from the date of the verbal agreement, and the plaintiff claims that he is entitled to have the bargain put into writing and executed by the defendants so as to enable him to register it. He asks a judgment declaring him entitled to all the rights and privileges contained in the verbal agreement, or in the alternative for possession of the nine inches of his land which is covered by the wall of the building erected by Cross.

The defendants set up, among other defences, that whatever was done on the nine inches was done by the leave and license and at the express instance and desire of the plaintiff, and further, that they never did nor do they object to the plaintiff being allowed to build against and use the wall in question as a party wall, and that they have always acquiesced in and conceded the plaintiff's right so to do on payment of half the actual cost thereof.

The plaintiff has never sought to use the wall on the terms agreed on, but merely wishes to preserve his rights. The action was dismissed at the hearing, and now the plaintiff appeals to the Divisional Court.

If the plaintiff is entitled to a declaration of right under G. O. 538, I must say that it seems to have been quite unnecessary to have gone down to a trial with witnesses, for upon the face of the defence there is a concession of all the rights and privileges claimed by the plaintiff in respect of this wall. The plaintiff has no ground for asking that the verbal agreement

should be manifested in writing. The parties chose to deal on the footing of an oral bargain, and the Court cannot, in this respect, put either of them in a more advantageous position. Neither can the plaintiff be affected by the Statute of Limitations, because the original taking of the nine inches was by the permission of Cross, and subject to the rights of the plaintiff to use it as agreed upon, and the character of this occupation has never changed : *Malcolm v. Hunter*, 6 O. R. 102 ; *Tone v. Preston*, 24 Ch. D. 139.

No doubt the plaintiff might be prejudiced if the land of the defendant was conveyed to a registered purchaser for value, without notice of the agreement, and might also be prejudiced by the difficulty of preserving evidence to prove the oral agreement. An appropriate remedy for these possible wrongs would be a declaration of the plaintiff's rights by virtue of the original agreement, which, being registered, would afford ample protection. I understand that the Judge was of opinion at the hearing that this was not a case for such a declaratory decree or judgment. Upon the authorities, I come to the same conclusion.

In *Ferrand v. Wilson*, 4 Ha. at p. 385, Wigram, V. C., refers to a defect in the jurisprudence of England, namely, the want of a jurisdiction to ascertain and declare rights before a party interested has actually sustained damage. And he proceeds to point out that until the parties in possession of the estate which the plaintiff claims shall so act as to give him a right to proceed against them for the protection of his rights, the plaintiff must be left to the imperfect and unsatisfactory proceeding of a bill to perpetuate testimony. The same view of the law, as administered in Courts of equity, is held and elucidated by Turner, L. J., in *Langdale v. Briggs*, 8 DeG. M. & G. at p. 427. Now, by the construction placed upon G. O. 538, there has been no enlargement of the jurisdiction by that order in this direction. The limited scope of the order is recognized in *Botham v. Keefer*, 2 A. R. 595 ; and the rule and course of the Court are further emphatically defined by Jessel,

M. R., in *Hampton v. Holman*, 5 Chy. D. at p. 187, thus: "It was always the settled law of the old Court of Chancery, and it is therefore now the settled law of the Chancery Division of the High Court of Justice, that it is not the province of the Court to declare the rights of parties except in cases where immediate relief can be given. The immediate relief may be merely incident to the estate, as, for instance, where a question arises as to the cutting of timber by a tenant for life, or remainder man." The earliest case upon the original of our G. O. 538, i. e. 15 & 16 Vic. ch. 86, sec. 50, is *Jackson v. Turnley*, 1 Drew. 617, where it was held that the act did not entitle a plaintiff to have a declaration as to a claim which may be made by another under circumstances which may or may not happen.

In *Rooke v. Lord Kensington*, 2 K. & J. at p. 761, Sir W. Page Wood held that the Act did not authorize the Court to say "that a party can come as plaintiff into this Court and state that he has a good legal title to property, but that some one sets up an equity which ought not to be binding on him because he had no notice of it. * * In such a case the plaintiff simply says, I have a title which is in an unsatisfactory state; there are equitable interests outstanding, of which one may say hereafter I had notice, and I want the Court now, though no claim has been made, to determine whether or not I had notice of these dormant equitable claims."

No decision has been cited to justify any declaration of right in the present case. A declaration of future rights was made in *Bogg v. Midland R. W. Co.*, L. R. 4 Eq. 310, by the same Judge who decided *Rooke v. Lord Kensington*, but that was a case very different from the facts here. That went upon the ground that the plaintiff had no other way to substantiate her claim except by coming to the Court. But here the claim of the plaintiff is virtually admitted, and it is open for him at any moment to make use of the wall as a party wall upon payment of half the costs. He made his own bargain, and cannot come to the Court to give him a better bargain. He knew that he

could not register the agreement, and he knew that he might be embarrassed by a sale and conveyance of the adjoining property to a person who had no notice of his right. He has now the power, and has always had it in his own hands to protect himself by using the wall as a party wall, and if he does not choose to avail himself of this right he must abide any consequences resulting from future changes in the position of the parties or the property.

Having regard to the frame of the pleadings, I am disposed to aid the plaintiff as far as can be done consistently with the authorities, and I see no objection to the judgment being thus worded, that though it appears by the pleadings that the defendants concede the rights and privileges demanded by the plaintiff under the verbal agreement set forth in the statement of claim, yet that this Court having no jurisdiction to make a declaration of right in the premises, doth affirm the decision under review, and doth dismiss the action, with costs.

PROUDFOOT, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

FITZGERALD ET AL V. WILSON ET AL.

Tax sale—Proof of taxes in arrears—Warrant to sell—32 Vic. c. 36, secs. 9, 128—R. S. O. ch. 180, secs. 90, 127.

A sale in 1880 of non-resident lands for taxes being impeached on the ground of no taxes being due, the original non-resident collector's roll for 1877, 1878, and 1879, were produced, shewing amounts in arrear for each year respectively, which with interest amounted to the sum for which the land was sold. The due preparation of the warrant to sell, and advertising in the Official Gazette were also proved.

Held, sufficient proof of the taxes being due.

It was also objected that the warrant was not addressed to any one. It recited that the treasurer had submitted to the warden the land liable to be sold, and proceeded: "Now, I, the warden, command you," &c. This was given to the treasurer, was produced by him, and was acted on by him. The warrant purported to be drawn up pursuant to 32 Vic. ch. 36, sec. 128.

Held, that the warrant was sufficient.

The Court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy, and no possible prejudice resulting from literal inaccuracy in the frame of the warrant to sell.

THIS was an action brought by G. B. Fitzgerald and J. McLennan, executrix and executor of E. Fitzgerald, against R. Wilson, W. Glover, and J. Wilson, to recover possession of certain lands which had formerly belonged to the testator, but which the defendants claimed had been bought at a tax sale by the defendant R. Wilson, who had recently conveyed some interest therein to his co-defendants. This sale the plaintiffs now impeached as invalid, on grounds which sufficiently appear from the judgment of Boyd, C.

The action was tried in Toronto, before Wilson, C.J., on May 7th, 1884, who entered a nonsuit.

The plaintiffs now moved by way of appeal before the Divisional Court on September 12th, 1884.

MacLennan, Q.C., for the plaintiff, referred to R. S. O. ch. 180, secs. 127, 155, 156; *Chrysler v. McKay*, 3 S. C. R. 436; *Morgan v. Quesnel*, 26 U. C. R. 539; *Church v. Fenton*, 5 S. C. R. 240; *Archbold's Practice*, 12th ed., pp. 607-9.

S. H. Blake, Q.C. and *Walsh*, for the defendants, referred to *Fleming v. McNab* A. R. 656; *Clarke v. Buchanan*,

25 Gr. 559; *Hutchinson v. Collier*, 27 C. P. 249; R. S. O. ch. 95, sec. 8; *Wkateley v. Whateley*, 14 Gr. 430; *Perry on Trusts*, 2nd ed., p. 142.

December 18th, 1884. BOYD, C.—The defendant asserts ownership of the land by virtue of a deed for taxes made to him on February 13th, 1882. The validity of the title is attacked on three grounds by the plaintiff.

1. That there was such a confidential relationship between the defendant R. Wilson and Mr. Fitzgerald regarding this land that the former was incapacitated from purchasing at a tax sale, and holding as against Fitzgerald.

2. The proceedings to sell are attacked because there was no proper proof of any taxes being due; and

3. Because the warrant to sell was not addressed to any one.

Taking the last objection first. It is provided by 32 Vic. ch. 36, sec. 128, now R. S. O. ch. 180, sec. 127, that the warrant to sell shall be under the hand of the warden and seal of the county, commanding the treasurer to levy upon the land for the arrears of taxes due thereon. The warrant here recites that the treasurer of Simcoe had submitted to the warden the lands liable to be sold, and then proceeds, "Now I, the warden, command *you* to levy," &c. This was given to the proper officer to sell, viz. the treasurer, was produced by him, and was acted on by him. The treasurer of the county alone has the right to sell under the statute, and the warrant purports to be drawn up pursuant to the authority given by sec. 128 of ch. 36.

In my opinion the warrant, as drawn and acted on, justified the sale. The principles acted on by the Court of Common Pleas, and the Court of Appeal, and the Supreme Court, in *Church v. Fenton*, 5 S. C. R. 240, are applicable here to shew that the Court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy, and no possible prejudice resulting from literal inaccuracy, in the frame of the warrant to sell.

The proof of taxes being in arrear was supplied by the

production and proof of the original non-resident collector's roll for 1877, in which this land appears in arrear for \$20.60. That was the only roll in which this land appeared for that year (see 32 Vic. ch. 36, sec. 9, R. S. O. ch. 180, sec. 90.) Similar rolls were proved for the year 1878, with the taxes at \$18.60, and for the year 1879, with taxes at \$20.60. These sums, with interest and costs, amounted to \$76.92, to realize which the land was sold. Proof was made of the due preparation of the warrant to sell, and the due advertising in the *Official Gazette*. It is not disputed that the land was properly dealt with as non-resident land during these years.

In *Doe d. Bell v. Beaumer*, 3 O. S. 243, the only proof of arrears was the production of the writ under which the sale took place, and the Court held that it was incumbent on the plaintiff to shew that the writ to sell was grounded on the treasurer's return declaring the assessments to be eight years in arrears on this particular tract of land.

In *Munro v. Grey*, 12 U. C. R. 647, there was no proof that any taxes were unpaid or in arrear, except an extract from the treasurer's book, by which it appeared that the taxes had been paid up to a period nine years before the year of sale, and that was held insufficient legal evidence that any taxes were eight years in arrear.

The degree of proof settled in 1833 by the case in 3 O. S. was expressly approved and acted on in *Errington v. Dumble*, 8 C. P. 65. All these prior decisions are reviewed in *Hall v. Hill*, 22 U. C. R. 578.

Prior to 16 Vic. ch. 182, writs to sell for taxes were grounded on the treasurer's return to the Quarter Sessions, declaring the assessments on the lands therein mentioned to be in arrear for eight years. Upon this return a writ was made out directing the sheriff to levy. The proof failed in *Munro v. Grey*, because there was no evidence that the treasurer had made any return to the Quarter Sessions. By 16 Vic. ch. 182, when a portion of the tax was due for five years the treasurer was to

issue his warrant to the sheriff to sell, and the previous manner of procedure by way of return to the Court was abolished. That warrant combined the return and the writ issued thereon, and Draper, C.J., said it was open to argument whether the warrant alone was not *prima facie* evidence that the taxes therein were in arrear. "But," he proceeds, (22 U.C.R. p. 581) "we see no reason to doubt that the evidence of the treasurer himself producing his official books, and shewing therefrom that the lands in question were charged with taxes which were unpaid when the warrant issued is as good proof as the treasurer's return was under the old Act." This case went to appeal on other points and was affirmed, 2 E. & A. 569. The proof from the treasurer's books in *Hall v. Hill* held to be sufficient, relates to the provisions of 16 Vic. ch. 182, sec. 51, by which the treasurer was directed to make entries of all lands on which taxes were unpaid, as appearing in the returns made to him by the clerk of the municipality and from the collector's rolls. So that the Court drew a line at this point as a proper place of departure for the evidence, without requiring the plaintiff in the first instance to go back to the origin of the assessments.

In *Hutchinson v. Collier*, 27 C.P. at p. 253, Hagarty C.J., says: "We think it has been held for many years that the entry in the treasurer's books was *prima facie* evidence of taxes being in arrear."

In *Clark v. Buchanan*, 25 Gr. 559, the late Chancellor Spragge held that the production of the warrant directing the sale, issued by the treasurer to the sheriff, under 16 Vic. ch. 182, was sufficient evidence of the taxes being in arrear. This case is cited with approval and followed in *Wapels v. Ball*, 29 C.P. at p. 405.

In the present case, the proof of arrears rests on a most satisfactory foundation—upon proof of the original rolls by which the taxes for the various years were imposed. These rolls shew in truth the very inception of the rates and taxes in question, by the entries of the clerk of Mono on the non-resident roll, in pursuance of 32 Vic. ch. 36, sec. 92. (O.)

I have been thus particular because it was urged that the proof was insufficient, under *McKay v. Chrysler*, 3 S. C. R. 436. As I read that decision it has no application here, because the majority who determined the case thought that there was no evidence to shew that the land had been properly assessed. The entries there in evidence were of such a character as to render it impossible to say whether taxes were in arrear or not. It was attempted to eke out their insufficiency by the oral testimony of the treasurer, but this resulted in a consummation of confusion worse confounded, as the Chief Justice declared his answers to be unsatisfactory, inconclusive, incoherent, and unintelligible (*vide p. 450.*)

Upon the remaining objection, I think proof of the plaintiffs' contention fails. The evidence negatives the conclusion that Mr. Fitzgerald ever relied upon Wilson or even asked him to see after the taxes in any way. The evidence points rather in a contrary direction, viz., that Mr. Fitzgerald distrusted Wilson, and was seeking to protect his own interests in regard to the taxes by making inquiries for himself from the treasurer (see letter of December 3rd, 1879.)

The tax sale was on December 15th, 1880, and no doubt the real explanation of the land not being redeemed was that Mr. Fitzgerald's state of health disabled him from attending to business.

It may be that the defendant R. Wilson acted in a stealthy manner and took advantage of a state of affairs which a man of nicer perceptions would never have utilized for his own advantage; but that (even if proved) is not a reason for clothing him with the character of agent, or for holding him disentitled to retain a benefit which he has acquired by legal means.

The judgment of the Chief Justice should be affirmed, and the action dismissed, with costs.

FERGUSON, J.—I think the evidence of the taxes being in arrear was sufficient. *Hutchinson v. Collier*, 27 C. P.

238, would seem to me sufficient for this. There the entries in the treasurer's books were held sufficient. Here the collector's rolls were produced. The rolls are as good as the books, if not better. The case, *Chrysler v. McKay*, 3 S. C. R. 436, cannot, I think, be made to do the service required of it here.

Can there be any real doubt about the warrant? The contention was, that it was not on its face addressed to any one. All the rest was admittedly correct. It was signed and sealed by the proper officer. It was handed to the proper officer, who acted upon it, and sold the lands. It used the pronoun "you" when, as was said in argument, it should have contained the noun for which the pronoun was used. I cannot think this objection should prevail.

As to the confidential relation of the defendant to the late Mr. Fitzgerald which it was contended was shewn to have existed, I am of the opinion that it was not proved. The evidence rather shewed the contrary, so far as the taxes were concerned. It shewed, I think, that Mr. Fitzgerald was taking care of his own interests in this respect, and that in other perhaps not important respects he was not willing to trust and did not trust Wilson. I think Wilson did not act nicely in the matter. When the case was first before me, I thought he acted meanly. But these are not enough.

I think the judgment should be affirmed, with costs.

PROUDFOOT, J., concurred.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

TILSONBURG AGRICULTURAL MANUFACTURING COMPANY
v. GOODRICH.

*Subscription for stock before incorporation of company—R. S. O. ch. 150—
Non-liability for calls.*

The defendant with others agreed to apply for a patent for a company for manufacturing purposes, under R. S. O. ch. 150, and signed a stock list subscribing for certain shares, and agreeing to pay therefor as provided by the Act and the by-laws of the company. Subsequently a petition purporting to be by thirteen of the subscribers, but omitting the defendants name, was presented to the Lieutenant-Governor of Ontario for a patent incorporating the petitioners and "such others as might become shareholders in the company thereby created a body corporate," &c. The stock list, however, subscribed by the defendant appeared to have been filed in the office of the Secretary of State. The petitioners were accordingly incorporated, "and each and all such other person or persons as *now is, or are, or shall at any time hereafter become a shareholder or shareholders in the said company under the provisions of the said Act,*" &c. The defendant did not subsequently to the incorporation subscribe for stock, but on the contrary repudiated his former subscription.

Held, that the defendant was not a stockholder, and was, therefore, not liable for calls on the shares which he purported to have subscribed for.

ACTION for calls on five shares of stock.

Defence: Denial that the defendant was the holder of the five shares, or that the company made five calls, or gave notice to the defendant of such calls having been made: that the defendant was induced to take the said shares by the fraud of the plaintiffs, and within a reasonable time after notice of said fraud, and before benefit derived by him from the said shares, he repudiated the same and liability therefor: that the plaintiffs falsely and fraudulently represented to the defendant that they had \$20,000 of capital subscribed, or if not they could and would obtain it before commencing business, relying on which the defendant agreed to take the five shares; but the plaintiffs neither had nor did they procure said capital before beginning business, and defendant would not, but for such misrepresentations, have taken such stock, and as soon as he ascertained them he repudiated.

The case was tried before Rose, J., and a jury, at the

last Autumn Assizes at Woodstock, when a verdict was rendered for the plaintiffs for \$262.90.

The following facts appeared :

The defendant and others, resident at Tilsonburg, agreed to make application for Letters Patent forming a company for the manufacture of agricultural implements, under the R. S. O. ch. 150, and preparatory thereto they signed a stock list, which read as follows :—“ We, the undersigned, hereby subscribe for the number of shares, of the value of one hundred dollars each, set by us opposite our respective signatures hereon, of the capital stock of the Tilsonburg Agricultural Manufacturing Company, to be incorporated under the provisions, etc. * * * And agree to pay for the said shares as provided in the said Act and the By-laws of the Company.” The defendant in that way subscribed for five shares.

Afterwards a petition, dated the 5th of January, 1883, addressed to the Lieutenant-Governor of Ontario, purporting to be the petition of thirteen of the subscribers of the stock list, omitting the defendant’s name, and subscribed by the petitioners, was sent to the government.

The petition asked that Letters Patent should issue incorporating the petitioners “ and such others as may become shareholders in the Company thereby created a body corporate,” etc. It concluded with the statement that the “ Petitioners have taken the amount of stock set opposite their respective names.” Then followed the signatures of the petitioners, with the number of shares taken by each, opposite, and a statement that ten per cent. had been paid on the amount thereof.

According to the copy of this petition, from the department of the Secretary of the Province, filed in this case, the defendant’s name nowhere appeared on it, nor was there any reference to him; but the stock list subscribed by him appeared to have been filed in the department.

Pursuant to the petition Letters Patent issued incorporating the petitioners by their respective names, “ and each and all such other person or persons as now is, or are, or

shall at any time hereafter become a shareholder or shareholders in the said company under the provisions of the said Act," &c.

The company went into operation under their charter, and made five successive calls on the shares which they insisted the defendant had subscribed of the stock of the company, to recover the amount of which calls this action was brought.

November 26th, 1884. *Osler, Q. C.*, obtained an order *nisi* to set aside the verdict and enter a nonsuit or judgment for the defendant, or for a new trial, on the law, evidence, and weight of evidence.

February 5th, 1885. *Osler, Q.C.*, in support of the order *nisi*, cited *Thring's Law and Practice of Joint Stock Cos.* 4th ed., 27, note b; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341; *Hawkins's Case*, 2 K. & J. 253; *Cote v. Stadacona Ins. Co.* 6 S. C. 193; *National Ins. Co. v. Egleson*, 29 Grant 406; *Nasmith v. Manning* 5 A. R. 126, 5 S. C. 417.

Aylesworth, contra. The defendant was the active man and the Letters Patent include him. These letters issued on the evidence of the memorandum of 13th of Nov., 1882. The defendant thus became incorporated just as much as if his name had been mentioned. He referred to *Phoenix Mutual Life Ins. Co. v. Barteanu*, 67 N. Y. 354; *Wolverhampton, &c. Co. v. Hawksford*, 6 C. B. N. S. 336; *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217.

May, 27th, 1885. O'CONNOR, J.—Section 3 of the Act in question gives the Lieutenant-Governor in Council power to constitute the petitioners, "and others who may become shareholders in the Company thereby created, a body corporate," etc.

It appears then that the words "*now is, or are, or,*" in the Charter, are not authorized by the Statute, and are therefore useless.

Then the defendant was not incorporated with the petitioners and could become so only by subscribing for

stock and becoming thereby a stockholder in the company. This it appears he has not done, but on the contrary he has repudiated his subscription.

Hereupon arises the question, whether the defendant's subscription of stock, in the manner and under the conditions stated, was available to the company in the same manner as if it had been subscribed after the charter issued, although the company was not in existence when that subscription was made; or is it to be treated as a mere proposal to take stock after the company should be formed, although by its language it purports to be an actual subscription *in praesenti*?

The order *nisi* is to set aside the verdict and enter a nonsuit, or a verdict for the defendant, or that a new trial be granted.

The ground for a nonsuit is the one above intimated, namely, that the defendant had not subscribed for shares, and was not a stock-holder in the company. I have examined the several cases and text books cited on the argument, but find them of little assistance. English cases on the point are not likely to exist, because under the Companies' Act, 1862, a subscriber of the memorandum of association is, by sec. 23, bound to take from the company as many shares as he has subscribed for, whether or not the shares have been allotted to him, unless indeed all the shares in the company have been allotted to other persons and before 1862 such cases were provided for by the standing orders of Parliament respecting Acts of Incorporation: *Thring* on Joint Stock Companies (4th ed.) p. 27, and *Watts's* Law of Promoters (1880) pp. 1, 7, 10, 18, 27 and 39.

The company was not in existence in this case when the defendant signed the paper which I have designated a stock-list. He was not afterwards made an incorporator of the company, but on the contrary appears to have been ignored in that proceeding.

The defendant cannot, I think, be held to have subscribed stock in the capital of a company which at the time was not in existence, nor can it be said that he made a contract

with the company which bound him to take stock *in futuro*. There is no statute in this country that I know of, nor has one been referred to by counsel, like the English Act, which makes such a stock-list available to the company when incorporated. But here the company and the stock were only *in prospectu*, and not *in esse*, and how can this company then only *in posse* be a party to and stock not *in esse* be the subject of a contract *in praesenti*? See *Kelner v. Baxter*, L. R. 2 C. P. 174; *Melhado v. The Porto Alegre, &c., R. W. Co.*, L. R. 9 C. P. 503.

Whether or not the co-subscribers on that list could effectually institute proceedings against the defendant to compel specific performance, contribution, or for any other purpose in relation to the company, is another and a different question, upon which, however, I am not prepared to and do not pronounce an opinion.

I think the order ought to be made absolute to enter a nonsuit, with costs.

WILSON, C. J.—I do not think I can hold the defendant to be a member of the company. The statute says that Letters Patent may be granted to any number of persons, not less than five, "who shall petition therefor, constituting such persons and others who may become shareholders in the company thereby created a body corporate;" and the petition for incorporation uses the same language.

The patent is wider than the petition, and in the operative part it incorporates the petitioners "and each and all such other person or persons as now is or are or shall at any time hereafter become a shareholder or shareholders in the said company."

The defendant was not a party to the petition, and he is not by the terms of the statute a member of the company, and he has done nothing since the patent by attending meetings or otherwise which can have relation to his agreement to take stock.

I thought for a time the defendant could be held to be a member of the company, and I should have been glad to

be able to work that out, for it is not right after leading others on he should withdraw now, and leave those he may have induced to join to bear the losses of the company.

I am obliged to say the order must, in my opinion, be made absolute, with costs.

ARMOUR, J., concurred in the result.

Order nisi absolute, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. SPARHAM.

Ontario Medical Act, (R. S. O. ch. 142, sec. 40—Erasure of name from register—Conviction—Distress for penalty—32-33 Vic. ch. 31, sec. 57 D.,—Evidence—Certiorari—Costs.)

A conviction under the "Ontario Medical Act," (R. S. O. ch. 142, sec. 40,) for practising without being registered, was quashed, because in default of payment of the fine imposed, distress was also awarded; and, *Held*, that sec. 57 of ch. 31, of 32-33 Vic. D., does not apply as by sec. 46 of the Medical Act provision is made for enforcing payment. *Held*, also, that sec. 40 applies to any person whose name has been erased from the register, though he may have practised after having been first registered.

Sembler, that on a prosecution under the Act the defendant may shew that as a matter of law his name was on the register, though by accident or design improperly removed or erased therefrom.

Held, also, following *Regina v. Roddy*, 41 U. C. R. 291, that the defendant was properly rejected as a witness in his own behalf.

Quere, whether the right to a *certiorari* was taken away by an appeal to the Quarter Sessions.

The defendant was refused his costs, as the ground on which he had succeeded did not go to the merits.

THIS was a motion, on return to a *certiorari*, to quash a conviction under the Ontario Medical Act (R. S. O. ch. 142.)

Britton, Q.C., for the motion.

Aylesworth, contra.

The facts and arguments appear in the judgment.

July 3, 1885. ROSE, J.—The defendant was at one time a duly licensed and registered practitioner, but having been convicted of a felony his name was erased from the register under the provisions of sec. 34 of the Act.

The sentence of death was, I understand, pronounced—the crime being murder—death being caused by the use of an instrument to procure abortion: *vide The Queen v. Sparham and Greaves*, 25 C. P. 143. It does not appear on the evidence, but counsel stated that the sentence was commuted, and after serving a number of years the defendant was discharged.

The erasure of the name was on the 15th of July, 1875, and looking at the dates of the proceedings I should judge after the sentence had been commuted.

After the expiry of the sentence the defendant resumed his practice, when an information was laid under sec. 40 of the Medical Act, which provides that "It shall not be lawful for any person not registered to practise medicine * *" and rendering any one so practising liable on summary conviction to a penalty not exceeding \$100, nor less than \$25.

On the hearing evidence was given of the practising of medicine, and the register was produced shewing the name erased, with the minute "1875, July 15, Eric Bengal Sparham, name erased by order of council, he having been proven to have been guilty of felony.

THOMAS PYNE, Registrar."

The Acting Registrar was called, who produced the register, and said: "I don't know when this erasure was made, except from looking at the book and minutes of council. Defendant appears from the book to have been registered 13th June, 1866, and so far as the books shew he remained a registered practitioner until 15th July, 1875. It does not appear from the books or minutes that defendant had any notice of his name being or being about to be erased from the register. I do not know what evidence was before the council when it was resolved by the council to erase defendant's name from the register. There is no

record in the books or minutes of the council that I know of shewing that any evidence was before the council.

The defendant was tendered as a witness, but refused, the magistrate acting on the authority of *Regina v. Roddy*, 41 U. C. R. 291.

The defendant was convicted, ordered to pay \$25 and costs, in default of payment, distress, and in default of distress, imprisonment.

Mr. Britton first urged that the conviction was informal, and must be quashed, because no power to levy distress is given by the Act.

Section 46 provides "and in case the penalty and costs awarded by him or them are not upon conviction forthwith paid, may commit the offender to the common gaol there to be imprisoned for any time not exceeding one month, unless the penalty and costs are sooner paid."

Mr. Aylesworth replied that 82-3 Vic. cap. 31, sec. 57, (D.,) gave the power.

Reference to that section shews that it does not apply where by the Act authorizing the conviction, a mode of enforcing the payment is stated or provided.

In *Paley on Convictions*, 6th ed., p. 812, it is stated: "The mode of enforcing the judgment of pecuniary fines is usually by distress or imprisonment. The power of proceeding by these compulsory methods is derived entirely from special statutory provisions, and is not any necessary consequence of a conviction. If a statute conferred only a power to convict without making provision for the recovery of the penalty, there seems to have been no compulsory means of carrying such law into effect." Reference is then made to 11 & 12 Vic. ch. 43, secs. 19, 21, where are provisions similar to those found in sec. 57 of ch. 31, above referred to.

Reference may also be had to the form of conviction on p. 662 under 1 and 2 Will. IV. ch. 32, sec. 23, the provisions of which sec. and of sec. 38 are somewhat similar in effect to those of the Medical Act.

It seems to me that sec. 46 provides a mode of enforcing the payment of the penalty, and that sec. 57 of ch. 31 does not apply, and therefore the conviction must be quashed on that ground.

Mr. Britton raised other objections to the conviction which I will briefly notice, as they were well argued on both sides, and I have formed an opinion as to most of them.

2. That sec. 40 does not apply to any person who practises after registration once had, even if name erased, i. e., that we should read "not having been registered" instead of "not registered."

I am of the opinion that a reference to the language of secs. 21, "whose names are inscribed," 22, as to "necessary alterations;" 31, 34, 35, 36, and sub-sec. 2, "is registered;" 43, 44, and 45,—shews this argument not to be tenable.

3. That name improperly struck out, as no notice given or opportunity to shew cause, citing *Regina v. College of Physicians and Surgeons of Ontario—In re John McConnell*, 44 U. C. R. 146.

I am much pressed with this objection, assuming that it can be raised on this motion.

Mr. Aylesworth objected that the fact of the name not appearing on the register was all the magistrate had to deal with. I do not think a person on trial for an offence for which he may be fined, and in default of payment imprisoned, should be prevented from shewing that as a matter of law his name was on the register, or must be taken to be on the register, although some one by accident or design improperly removed or erased it therefrom. *Regina v. Osler*, 32 U. C. R. 324, may be referred to.

My greater difficulty is, that I do not see any evidence that no notice was given or opportunity to shew cause afforded: the witness called did not of his own knowledge know, and the register or minutes were not evidence of the registration.

There is no law that I was referred to requiring the council to keep a record, and declaring that the non-entry in such record should be evidence against the council.

But assuming that it was not given then, it may be that *re McConnell* applies, and that on application for a *mandamus* the council can be compelled to restore the name to the register.

It will be observed that sec. 34, as was pointed out in that case, applies to all felonies. If a person were convicted of a felony where the statute gave power to inflict, say a day's imprisonment, as is provided in many cases, see 32-33 Vic. ch. 21, (D.) and the prisoner were really not morally guilty, would it not be unjust to have his name erased without notice or opportunity to shew cause? Indeed, in the present case the defence against which the jury found might possibly have been one to which the council would have given effect, and they could have well said, although by the finding of the jury you must suffer the penalty of the law, we will not further disgrace you by erasing your name from our roll, for we believe you to be innocent. Such a case might arise where a man was executed for a capital offence.

It does not become necessary to decide as to this objection. If it did I fear I could not give effect to it for want of evidence.

The last objection was, that the magistrate was in error in rejecting the defendant as a witness. I am unable to distinguish this case in principle from *Regina v. Roddy*, 41 U. C. R. 291, and therefore think the objection not well taken.

There remains yet to be considered Mr. Aylesworth's objection that having appealed to the Sessions the right to a *certiorari* was taken away.

As to the fact, the only paper I have before me is the recognizance given to provide security on an appeal. I have no evidence of what became of the appeal, whether it was prosecuted or abandoned, and I therefore have no evidence to act upon to support the objection.

Again, no statute was pointed out which in express terms takes away the right of *certiorari* on a conviction under this Act.

I have further considered the authorities cited of *Regina v. Frawley*, 45 U. C. R. 227; *Re Bates*, 40 U. C. R. 284 : *Regina v. Caswell*, 33 U. C. R. 303 ; *Paley*, 6th ed. p. 434 ; and do not think I should give effect to the objection.

The ground of objection to the conviction is not one of form merely, it is one of substance.

The conviction must be quashed, but as the defendant has failed on all grounds except the first, which does not go to the merits, I think I should not give costs as I would be warranted in doing, this no doubt being a prosecution by the medical council or under its direction.

The usual order of protection will be granted to the magistrate, if required.

Conviction quashed, without costs.

[QUEEN'S BENCH DIVISION.]

WILLCOOCKS V. HOWELL ET AL.

*Libel—Recovery of verdict against several—Subsequent action against others—*Estopel.**

A recovery of a verdict in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel.

LIBEL against William Howell and one Biggs for signing a petition to the Board of License Commissioners in March, 1883, in which it was said of the plaintiff, of and concerning his inn, that "the one kept here by Mr. Willcocks is one of the worst drinking holes that there is in the county and kept very disorderly; and not suitable accommodation for a good respectable traveller; and the landlord is much given to drinking himself."

The defendants denied the publication, or that they published the same with the meaning alleged; and they said they were ratepayers and householders living in the neighbourhood of the inn, and that they and the Board of the License Commissioners had a common interest in the way in which the inn was kept; and it was a privileged communication, made *bond fide*, without malice, and for the public benefit.

The defendants also pleaded that George W. Howell, John E. Horning, and David R. Cochrane were jointly concerned with the defendants in publishing the petition, and that the plaintiff theretofore sued the said George W. Howell, Horning, and Cochrane, for damages in respect of the publication, and also of the writing of the said petition and the said alleged libels therein contained and set forth in the plaintiff's statement of claim, and he recovered a verdict against the said last-named parties and \$300 damages, which said damages and \$450 for costs the said last-named parties paid to the plaintiff, and he received from them the same; and the defendants

said the recovery of the said damages was a recovery in reference to the same cause of action as sued for by the same plaintiff in this action; wherefore the defendants said the plaintiff was estopped and ought not to be admitted to bring this action against these defendants.

The plaintiff, in reply to the last paragraph of the statement of defence, said the defendants separately and severally, and not jointly with said George W. Howell, Horning, and Cochrane, committed the grievances complained of in this action, and the recovery of the said damages from the said George W. Howell, Horning, and Cochrane was not a recovery in reference to the same cause of action, but for another and different cause of action than that complained of in the plaintiff's statement of claim set forth.

Issue.

The cause was tried at the last Spring Assizes held at Hamilton before Galt, J., and a jury.

The proceedings against Biggs were discontinued.

The evidence shewed that the License Commissioners got the petition in April, 1883, and the plaintiff did not receive a license for that year; and that parties in 1882 complained of the inn more than once, by letter and verbally. It was proved that the petition was signed in this order: 1. John E. Horning; 2. George W. Howell; 4. David R. Cochrane. The present defendant William Howell signed the petition after these names were to it.

The jury gave a verdict for the plaintiff, and \$50 damages.

May 19, 1885. *Osler*, Q. C., obtained an order *nisi* calling upon the plaintiff to shew cause why the verdict and judgment for the plaintiff should not be set aside and a nonsuit or judgment entered for the defendant, upon the grounds: 1. That there was no evidence of express malice on the part of the defendant. 2. That the cause of action was for the same wrong as that upon which the recovery was had in the former case of *Willcocks v. Howell, Horn-*

ing, and Cochrane, which recovery barred the plaintiff's right to recover herein. 3. And for mis-direction and non-direction on the part of the learned Judge at the trial.

Nesbitt, for the defendant, supported the order *nisi*. He contended the recovery against the parties to the former action was a bar to the maintenance of this action, and referred to *Willcocks v. Howell*, 5 O. R. 360; *Bowen v. Hall*, 6 Q. B. D. at p. 343; *Waller v. Loch*, 7 Q. B. D. 619; *Dewe v. Waterbury*, 6 S. C. 143; *Brinsmead v. Harrison*, L. R. 7 C. P. 547, affirming the decision in L. R. 6 C. P. 584; *Olger* on Libel and Slander, 157-159, 372-457; *Sloan v. Creasor*, 22 U. C. R. 127; *Kendall v. Hamilton*, L. R. 4 App. Cas. 504; *In re J. & H. Davison, Ex parte Chandler*, 13 Q. B. D. 50; *Booth v. Briscoe*, 2 Q. B. D. 496.

Robertson, Q. C., shewed cause. There was a different publication by each person as he signed and delivered the petition, and so there was and is a separate and distinct cause of action against each one of the parties who put his name to it. He referred to *Wright v. Woodgate*, 2 Cr. M. & R. 573; *Graham v. Crozier*, 44 U. C. R. 378; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; *Bird v. Randall*, 3 Bur. at p. 1350; *Kitchen v. Campbell*, 3 Wils. 304; *Martin v. Kennedy*, 2 B. & P. 69; *Thorpe v. Cooper*, 5 Bing. 116-129; *Harrison v. Pearce*, 1 F. & F. 567; *Frescoe v. May*, 2 F. & F. 124; *Colburn v. Patmore*, 4 Tyr. 677; *Creevy v. Carr*, 7 C. & P. 64; *Hunt v. Algar*, 6 C. & P. 245.

Nesbitt, in reply, referred to Rules 89, 91, 115, O. J. A.

June 30, 1885. WILSON, C. J.—The only question we have to consider is, whether the former recovery by verdict of the jury, and payment of the amount of the verdict and all costs without judgment being entered, is a bar to the maintenance of this action against the defendant, who was one of the twenty-six signers of the petition upon and in respect of which petition the plaintiff obtained the former verdict and damages.

I may as well, for convenience, treat the verdict and payment of it as a recovery by judgment, for payment of the damages assessed must be equivalent in effect to a judgment recovered, because a payment by way of accord and satisfaction would be a good defence of itself, and as the statement of defence shows the exact state of things, namely, a verdict recovered in the former action and a payment of the damages assessed therein, and of all costs of the action, there appears to be a complete case stated of satisfaction made to him for the publication of the libel.

I do not think it necessary to set out the purport of the different cases we have been referred to, and which I have examined: it is sufficient to state the result of them and the conclusions which must be formed upon them. They shew that a recovery against one of two joint debtors, or against one of two joint wrong-doers, is a bar to an action against the other joint debtor or joint wrong-doer, although the judgment recovered against the one has not been satisfied: *Com. Dig. Action*, K. 4; *Brown v. Wootton*, Cro., Jac. 74; *King v. Hoare*, 13 M. & W. 494; *Sloan v. Creasor*, 22 U. C. R. 127; *Brinsmead v. Harrison*, L. R. 6.C. P. 584, affirmed in Ex. Ch. L. R. 7 C. P. 547; *Kendall v. Hamilton*, 4 App. Cas. 504; and it makes no difference that the second action is not in the same form as the first one, so long as it is in respect of the same subject, and the evidence in the same case is of the like nature and effect which was required to support the first action: *Bird v. Randall*, 3 Bur. 1350; *Kitchen v. Anderson*, 3 Wils. p. 308. If the plaintiff recover against two by separate actions for a joint trespass, the satisfaction of the one judgment satisfies the other judgment, so far at any rate as the damages are concerned: *Com. Dig. Audita Querela*, A.; *Vin. Abr. Audita Querela*, D. (52); *Cocke v. Jenner*, Hob. 66. The like rule applies where different recoveries are had upon a joint and several obligation: *Vin. Abr. Audita Querela*, D. (12); Hob. 2, (3).

Of course we know by almost every day's experience in actions upon promissory notes, and in all other cases of joint and several obligations, the payment of the principal debt once made is a discharge to all others who are liable for it by judgment or otherwise.

Why then should not the same rule apply in actions for libel as in all other actions of tort?

If two or more are concerned in the publication of a libel they may be proceeded against jointly or separately, or in any other action for a wrong done; and if two are proceeded against for the libel, and a recovery is had against them, there can be no contribution between them: *Colburn v. Patmore*, 4 Tyr. 677.

In an action for tort against two, the damages, if the defendants are convicted, should be assessed against them jointly. If they are assessed separately the plaintiff cannot have both the amounts so assessed, but he may make his election to take the better damages by remitting the smaller sum: *Clissold v. Machel*, 26 U. C. R. 422; *Cocke v. Jennor*, Hob. 66 (69.)

As the plaintiff cannot, when he recovers against two in the one action for libel, have the two amounts of damages which have been assessed, why should he be entitled to a double satisfaction when he sues the two in separate actions? He may sue the two separately and have judgment against each of them as he may in any other action for tort, but he can nevertheless have only the one satisfaction. He has the election to take "the best damage, and yet when he hath taken the one satisfaction he can take no more": Hob. 66.

The plaintiff upon this petition, signed by twenty-six of his neighbours, has sued and recovered damages against three of the number, treating the publication of the petition as the joint act of these petitioners, and in the present action he has sued two more of the petitioners, but for some cause, probably because one of them settled with him, he has discontinued the action against him; yet he says there was a separate publication by each subscriber by

the mere act of signature of each one and by his delivering it to the person who was taking it round for signature. If there was a separate publication by each subscriber, as there would be if the proprietor of one newspaper were to copy an article complained of from another newspaper, the plaintiff could not have joined the three in the former action nor the two in this action; but he was quite right in suing the three together, because the whole twenty-six subscribers could have been sued in the one action, or any one or more of them in the one action. The plaintiff could even have sued each one of the twenty-six in a separate action, and have had the damages separately assessed; but he could have had only the one satisfaction, which would be the best or largest amount of damages which had been assessed in any of the actions. He would, however, have been entitled to his costs in each of the actions, and that would have been an abuse of his rights, and it was to guard as much as possible against such an abuse that the Exchequer Chamber affirmed the decision in *King v. Hoare*, in the case of *Brinsmead v. Harrison*, L. R. 7 C. P. 547, by declaring that after a recovery by judgment is had against one wrongdoer no other action can be brought against any other concerned in the same wrong.

It appears to me the very fact that an action for libel may be prosecuted against all who are, or against each one who is connected with the joint publication of it, in the one action, in like manner as *tortfeasors* may be in any other action, is a good and sufficient reason why the one action must be governed by the like rules which govern the other action; for the cause of action—and there is only the one cause of action—whatever the number may be who are concerned in a joint publication, becomes by the judgment *res judicata*, and the damages which were uncertain before, are reduced to a certainty by the judgment: *Brown v. Wootton*, Cro. Jac. 74.

The plaintiff, however, contended that there was a separate publication by each subscriber of the petition as he delivered it back to the person who brought it to him.

That, we think, is not so. The petition was an incomplete instrument until it was ready for delivery to the Board of License Commissioners, and in place of each subscriber making a separate publication, he identified himself with and became a joint participator with the preceding signatories. The case of *Maitland v. Goldney*, 2 East 426, supports that view of the facts. There the two defendants, who were jointly sued for libel, joined in an affidavit *severally* made by them, in which each one *deposed for himself*; and in *Starkie* on Slander and Libel,¹ ed. 354, 355, it is said referring to this case: "Where the wrongful act is the joint act of two or more, the plaintiff may proceed against them in one and the same action; as where the slander is contained in affidavits made by two, but so connected as to form one slanderous charge."

That is precisely the argument which might have been made for the plaintiff if objection had been taken to his first action when he joined three of the petitioners in that action.

The case before referred to, of *Martin v. Kennedy*, 2 B. & P. 69, is not an authority that libel is excepted from the rule applicable to other general wrongs. It was a decision that the Court would not, after a recovery against one of three for the joint publication of a libel, stay the proceedings in an action against another of the three, but that he must plead whatever defence he had to that action.

The defendant is therefore entitled to have a verdict and judgment entered in his favour upon the issue joined upon the fourth paragraph of his statement of defence, with the general costs of the cause, and the order will be absolute, with costs.

O'CONNOR, J., concurred.

ARMOUR, J., being absent at the Toronto Assizes, took no part in the judgment.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

HILLYARD V. GRAND TRUNK RAILWAY COMPANY.

Railways and railroad companies—Barbed wire fence—Injury therefrom—Non-liability for—Rejection of evidence of common user.

Held, O'CONNOR, J., dissenting, that in face of 46 Vic. ch. 18, sec. 490, subsecs. 15, 16, (O.,) which seemed to sanction them and empower municipalities to provide against injury resulting from them, barbed wire fences constructed by the defendants upon an ordinary country road along the line of their railway could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case having been passed respecting fences of the kind; and that the defendants were not therefore liable for the loss of the plaintiff's colt which, while following its dam, as the latter was being led by the plaintiff's servant, ran against the fence and received injuries resulting in its death.

Held, also, that the colt in question, five weeks old, following its dam, could not be said to be running at large, the universal custom of the country, which ought to govern, being for colts thus to follow the dam.

Held, also, that evidence of the common use of fences of the kind in other townships, and that other municipalities held out inducements to erect them, should not have been rejected, as shewing that they were not considered dangerous or a nuisance.

THE statement of claim alleged that the defendants carelessly and negligently built a barbed wire fence dividing their lands from the highway: that the fence consisted of five strings of wire from which projected sharp barbs, and there was no capping or coping to the fence, which was not a lawful fence, but was unsafe and dangerous; and that the plaintiff's colt, while in charge of the plaintiff's servant, and while passing along the highway at the place where the said fence was, came in contact with the fence, and was cut and maimed, and greatly injured by the fence, from which it afterwards died.

The defendants pleaded the general issue by statute.

The action was tried at the Assizes held at Brockville, last Spring, before O'Connor, J., and a jury, when a verdict was rendered for the plaintiff, and \$225 damages.

It appeared that the colt was about five weeks old that the dam, led by a man by a bridle or halter, was being taken from the plaintiff's residence, a distance of about two miles, along the highway to pasture, the colt fol-

lowing along after the dam, and running free; and that at that part of the highway it ran against the barbed fence and was injured, and died some time after.

The counsel for the defendants, at the close of the case, stated that he asked the jury to assess the value of the colt, and the expenses of treating it by reason of the accident, and then the question would be a general question, verdict for plaintiff or defendant.

The learned Judge directed the jury:

1. That the fence should have been of a reasonable kind for the protection of the public and of property passing along the highway; and that it should not be dangerous to life or limb, or to animals.

2. That it was intended to keep out cattle, but besides that it should not be of a dangerous character.

3. He directed the jury to consider whether the colt was reasonably under the control of a proper person at the time of the accident, and whether it was too young to be under any other kind of control than it was.

4. Should more precaution have been taken in taking the mare and colt along the highway to pasture than was taken?

5. Did the colt run against the fence from any fault of the man in charge?

6. Was the colt taken reasonable care of after it was injured? If the death was caused by improper treatment after the injury, and not for the wounds caused by the fence, the defendants would be answerable only for the injury done by the fence, and not for the death by the improper treatment; but the defendants would not be liable at all if the fence was a proper fence, as before stated, or if the man in charge were to blame by not having the colt in better control, or otherwise, as before stated.

The counsel for the defendants objected that the learned Judge should have told the jury:

1. That the fence was a kind of fence recognized by statute, and therefore lawful, and the defendants were not liable.

2. That the fence, although dangerous, was erected on the defendants' own property [being about six inches off the highway allowance, and wholly upon the defendants' own grounds] and the defendants were not liable.

3. That the fence, if dangerous, was not dangerous in itself, but became so only by reason of the colt running against it, and the plaintiff should not recover.

4. That the colt was a trespasser upon the highway, as it was at large, and both at common law and under the Railway Act the plaintiff should not recover.

5. That the fence was not the direct cause of the injury: that the injury was caused by the act of the colt running against the fence, and the damage caused was too remote from the real cause of injury.

6. That the plaintiff should have notified the defendants immediately of the injury done to the colt, and that the defendants were not therefore liable.

The jury found \$200 damages for the value of the colt, and \$25 for the attendance upon it in attempting to cure it.

May 17, 1885. *Nesbitt*, for the defendants, obtained an order *nisi* calling upon the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a non-suit entered, or a verdict and judgment entered for the defendants, or a new trial directed, on the ground that the evidence disclosed no liability on the part of the defendants; and for the improper reception of evidence; and for the improper rejection of evidence; and on the ground of misdirection and non-direction of the learned Judge; and on the ground that the verdict was contrary to evidence and the weight of evidence.

Osler, Q.C., *Nesbitt*, with him, supported the order.

It is submitted that the colt was running at large, was not in manual charge. The fence was allowable. It is a kind of fence now very common throughout the country. It is a fence not necessarily dangerous. The ordinary rail fences and stump fences are quite as dangerous, but they have not been complained of, although

accidents have happened from them. They cited *Markham v. Great Western R. W. Co.*, 25 U. C. R. 572; *Cooley v. The Grand Trunk R. W. Co.*, 18 U. C. R. 96; *Great Western R. W. Co. v. Davies*, 39 L. T. N. S. 475; *Burchell v. Hickisson*, 50 L. J. 101; *Mangan v. Atterton*, L. R. 1 Ex. 239.

O'Brien (of Prescott) and *Watson* shewed cause. The argument is of no force that the defendants are not liable because the fence is wholly on the defendants' own ground.

The mare was in the middle of the road at the time of the accident to the colt.

The fence was a dangerous one, and it might have been prevented by reasonable means from being so. Animals do not notice it, or if they do they do not see it or know of it as an obstruction, and there should have been a capping or something of the kind which animals could see to be an obstruction. The colt was not at large in the sense of cattle being at large. It was under as much control as a colt of five weeks' old could be.

The barbed fence was put there because it was dangerous to some extent. The case was fully proved. They cited *Barnes v. Ward*, 9 C. B. 392, 29 Albany L. J. 23 (1884), referring to *Williams v. Mudgett*, 2 Texas L. Rev. 337; *Hunt's Law of Boundaries and Fences*, 1884, pp. 86 to 93; *Manchester, &c., R. W. Co. v. Wallis et al.* 14 C. B. 213; *Ellis v. The Loftus Iron Co.*, L. R. 10 C. P. 10; *Humphries v. Cousins*, 2 C. P. D. 239-244; *Lee v. Riley*, 18 C. B. N. S. 722; *Corry v. Great Western R. W. Co.* 6 Q. B. D. 237, 7 Q. B. D. 322; *Bessant v. Great Western R. W. Co.*, 8 C. B. N. S. 368; *Lucas v. Township of Moore*, 43 U. C. R. 334, 3 A. R. 602.

Nesbitt, in reply, cited *Landreville v. Gouin*, 6 O. R. 462; *Fletcher v. Rylunds*, L. R. 3 H. L. 330.

June 30, 1885. WILSON, C. J.—This is a case of great and general importance. We are required to determine whether the ordinary barbed wire fence is one of a dangerous nature—whether in fact it is a nuisance. That such

a protection may be dangerous and a nuisance in some places cannot, I think, be doubted. If the doorways of shops and the boundaries of private residences, churches and other buildings on the sidewalks of thoroughfares upon King street, in the city of Toronto, for instance, and perhaps upon all sidewalks, were fenced in that manner, I should say the fence would be a nuisance, because of the imminent and constant risk there would be to persons walking along even with care in tearing their clothes and receiving personal injuries, and it would make no difference that such a fence in such a place stood a few inches off the street limits of the road, upon the property of the owner; it would still be too near to the highway and dangerous to those who were passing along it and lawfully using it.

But whether the fence which would be dangerous and a nuisance along such walks and great and crowded thoroughfares would be a nuisance along the sides of country highways will, in my opinion, require a different consideration.

The defendants have rather more than 400 feet of their property along the highway enclosed by the barbed wire. The highway runs in a northerly direction, and is crossed by the defendants' railway. There are no ditches on that part of the highway. The road is level from fence to fence. The accident happened about two miles from Prescott near to the Gladstone station of the defendants, and about 100 feet beyond the railway crossing. I understand the highway to be an ordinary country road in a well and old settled part of the Province.

The question we have to determine is, whether the barbed wire fence along that road was and is a dangerous structure, or, in other words, a nuisance.

The defendants are required by statute to erect and maintain on each side of the railway "fences of the height and strength of an ordinary division fence:" 46 Vic. ch. 24, sec. 9, D., amending section 16 and sub-sections of the 42 Vic. ch. 9, D.

The fence is not complained of because it was not of the height and strength of an ordinary fence.

Many cases were cited, but few of them are applicable.

In *Mangan v. Atterton*, L. R. 1 Ex. 239, the defendant exposed on a public street a machine which might be set in motion by any passer by, and which was dangerous when in motion, without being fenced or guarded. The plaintiff, a boy four years old, by the direction of his brother seven years old, placed his fingers within the machine whilst another boy was turning a handle which moved it, and the plaintiff's fingers were crushed. Held, the plaintiff could not recover. Per Martin, B.: "The injury was caused by the boy's own act. The damage was too remote from the defendant's act in putting the machine where it was." Per Bramwell, B.: "The defendant is no more liable than if he had placed goods coloured with poisonous paint, and the child had sucked them. But suppose the machine had been of a very delicate construction and had been injured by the child's fingers, would not the child in spite of his tender years have been liable to an action as a *tortfeasor*? This shews that it is impossible to hold the defendant liable."

In that case the machine while not in motion was not dangerous, and in that respect it was not what this fence is said to have been, dangerous in itself, and that was the ground of the decision in *Hughes v. Macfie*, 2 H. & C. 744. And besides, that boy, young as he was, was equally guilty with the one who set the machine in motion, for the three boys were acting in concert, and that precluded him from the right of recovery. See *Abbott v. Macfie*, 2 H. & C. 744.

But the case of *Mangan v. Atterton*, L. R. 1 Ex. 239, has not passed without comment. See *Clarke v. Chambers*, 3 Q. B. D. 339, where Cockburn, C. J., said: "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a

very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

In *Clarke v. Chambers* the defendant put a barrier across a private way on which his premises abutted, to prevent people from overlooking the athletic sports which were carried on in his grounds. In the middle of the barrier was a gap which was usually open, but which, when sports were going on, was closed by means of a pole let down across it. The defendant had no right to erect the barrier. Some persons, without the defendant's authority, removed a part of the barrier armed with spikes called a *chevaux de frise*, from the way where the defendant had placed it, and put it in an upright position across the way. The plaintiff was lawfully passing along the road on a dark night. He felt his way through the opening in the middle of the barrier and getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes of the *chevaux de frise* and was injured.

The plaintiff did not contribute in any way to the accident, and the jury found the use of the *chevaux de frise* in the road was dangerous to the safety of the persons using the road.

Held, the defendant having unlawfully placed a dangerous instrument in the road was liable for the injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party on removing the dangerous instrument from the carriage way where the defendant had placed it to the footpath.

In *Great Western R. W. Co. v. Davies*, 39 L. T. N. S. 475, the County Court Judge held the company liable. On appeal to the Exchequer Division the finding of the County Court Judge was reversed.

The facts were : A railway crossed on the level a parish highway eighteen feet wide. There was a gate for cattle and carriages at the crossing eleven feet wide, and another gate for foot passengers seven feet wide. The larger gate, when closed, came against the gatepost of the smaller gate, and upon or against a catch of iron fixed on and projecting from the front of the gatepost six and a half inches outwardly. The catch was one inch square at the end, increasing in thickness to about three inches in the widest part, and was about three feet four inches from the ground. It had been on the gate and in the same condition for eight or nine years without causing any injury or accident, and no objection or complaint had ever been made in respect of it, and it was a description of fastening used on many crossings and gates along the defendants' line and elsewhere.

Several cows of the plaintiff's were being driven by his servant from his field, near the line of railway, over a crossing, and it appeared from the evidence of the defendants' gatekeeper at the crossing that on reaching the gate which had been opened for the passage across the line by the gatekeeper, and while in the gateway, two of the cows began to fight with each other, and the one which the gatekeeper said he had on other occasions seen fighting with other cows, drove the other cow against the catch of the gate, and thereby caused injuries which resulted in the death of the injured cow.

In the County Court the Judge ruled that on the evidence, having regard to the purpose for which the gate was used, the fastening was a dangerous one, and the placing it on the post was an act of negligence on the part of the company for which they were responsible, and there was no evidence of contributory negligence in the plaintiff or that the injury was caused by the vice of any of the animals in question, and therefore the defendants were liable to the plaintiff for the damage to his cow, and he gave judgment accordingly.

On appeal, held by the Exchequer Division, reversing the decision of the County Court, that there was no evidence of negligence on the part of the company in their continuing to use the fastening in question, in which there was nothing intrinsically or necessarily dangerous, and which had been nine years in use on the gate without any mischievous consequences, and which was moreover a kind of fastening in common and general use elsewhere as well as along the company's line of railway. *Cornman v. Eastern Counties R. W. Co.*, 4 H. & N. 781; *Crafter v. Metropolitan R. W. Co.*, L. R. 1 C. P. 300; and *Rigg v. Manchester R. W. Co.*, 14 W. R. C. P. 834, were cited for the company.

In *Burchell v. Hickisson*, 50 L. J. 101, C. P. D., the plaintiff, a boy of four years, accompanied his sister who went to the defendant's house on business. A flight of steps protected on either side by railings led up to the front door. One of the railings had been displaced, leaving a gap of eighteen inches between the rails on either side of it. Across that gap a rope had been interlaced, but had worn away and had not been renewed. The sister had frequently been to the house, and had shortly before noticed the rail was missing. On the day in question the sister went up the steps, but the plaintiff in following her, fell through the gap and was injured: Held, the plaintiff could not maintain the action, for the only duty of the defendant towards him was to take care there was no concealed danger, and of that there was no evidence.

Lindley, J., said: "The plaintiff, no doubt, was too young to see or guard against any danger, but the logical way of considering the matter is, to consider it alternatively in this way. The defendants never invited such a person as the plaintiff to come unless he were taken care of by being placed in charge of others, and if he was in charge of others, then there was no concealed danger. In other words, there was no invitation to the plaintiff if he was not guarded, and if guarded, then there was no trap."

In the *Atlanta and West Point R. W. Co. v. Hudson*, 62 Georgia, 680, a railroad company, having enclosed its

track with a skeleton fence made of wire, set with barbs, must use due diligence in running its trains, not only to avoid injuring live stock upon the track, but to avoid precipitating them by fright upon the fence and causing them to be thus mangled or bruised.

The direction to the jury was: "If you believe from the evidence that the natural tendency of the fence was to injure stock, and if you believe from the evidence that the defendants, by the running of the locomotives without ordinary care caused the mare to run against the fence, and that she thereby became injured, the plaintiff would be entitled to recover. But if the employees of the defendants, in the running of the locomotives, used ordinary care to prevent the injury, the plaintiff would not be entitled to recover."

The Court said: "What is a lawful fence is defined by the code in sections 1443-4. A fence three feet high, and composed of two wires armed with projecting barbs, is not such a fence as will justify a railway company, whose line is enclosed thereby, in relaxing the full measure of diligence required by law in guarding against injuries to live stock from the running of locomotives and cars. On the contrary, if the wires would injure stock in escaping from the vicinity of the track in situations of danger, and would occasion a risk of hurt to them by being caught or thrown in attempting to get over or through the fence in making off from the railway, due care not to frighten or drive them upon the wire fence would be no less incumbent upon the company than the care of ordinary diligence to avoid injuring them upon the track. The peril in such a case would be a double or compound one, consisting of danger from the train on the one hand, and of danger from the fence on the other; precautions against both would be necessary.

Judgment affirmed."

The case of *Williams v. Morgett* is referred to in 29 Albany Law Journal, p. 23, reported in 2 Texas L. Rev. 337, in December, 1883, in which the plaintiff sued for injury done

to his horse by being driven against a barbed wire fence put up partly across a public road. The Court, it is said, held that such a fence was dangerous unless constructed with planks in connection with the wire. It was said the plaintiff was intoxicated at the time, and was driving very fast. The Court was of opinion the man might properly drive fast, and that his being intoxicated is not a good defence.

The article referred to quotes the opinion of the writer as follows: "Now a barbed wire fence is an array of miniature daggers : it is dangerous not only to run against it, but to touch it. When put up across a public road or across a line of general travel without something to indicate its presence, it is like a mantrap or a spring gun, and in our opinion he who thus heedlessly besets the travel of the country with such peril, is not entitled to demand a very high degree of care on the part of those whose flesh is lacerated, or whose lives are endangered by his acts. Yet we do not think the Court erred in admitting the evidence which tended to shew that the plaintiff and his companions may have been intoxicated at the time."

A fence may consist of almost any kind of enclosure or division, but a hedge, ditch, bank, or wall is what it commonly consists of.

In *Firth v. Bowling Iron Co.*, 3 C. P. D. 254, the fence was made of wire rope. It has no bearing upon the matter before us for decision.

I think I have referred to whatever can be found upon the subject in addition to the cases which were cited on the argument.

If the defendants are answerable for having a fence of this kind it is and must be because it is in its structure and finish more dangerous than the fence which had been ordinarily in use.

An ordinary board fence might be more dangerous in case of a horse running against it, than if it ran against a barb wire fence, for the greater resistance of the board fence might kill or injure the horse more seriously by shock

than the wire fence, which would yield more to the pressure. A rail fence might also be more dangerous in such a case than either the board or barbed wire, for besides the shock, the horse might be killed or badly shocked by striking against the ends of the rails. A wire fence is not at first noticed or seen by cattle or horses, and at first is not likely to be known by them as offering any resistance to their passing through it. A paper fence would seem to them more of an obstacle than a wire fence.

A simple wire fence would offer no serious obstruction to animals, for horses and cattle could readily break it down. And it is because it is so easily broken down that barbs are put upon it, for the pressure which the animal can bear against the simple wire does not prevent them from continuing or repeating their efforts, while the barb inflicts pain or injury, and deters them from pressing against or repeating their efforts by pressure to break through.

It is quite plain then that the barbed wire is used because it is more dangerous than the simple wire, by giving pain and doing injury when come in contact with. The objection to the simple wire on the part of the person who desires to have it, is that it is too easily broken through or broken down. The objection to it on the part of others is that it is not very noticeable, and damage may be suffered by going or driving against it without knowing of its being in the way.

There is no objection to the barbed wire by the person desiring to have it, because the barbs supply to him the deficiencies of the simple wire ; but the objection to that kind of fence by others is that not only is it not readily seen, but that persons and animals may not only run against it, but if they do they are more injured, and perhaps very much more injured than they could be if it were a simple wire fence.

The barbed wire is certainly a cause of danger to some extent, and it is said much of that danger may be removed if a cap or strong piece of wood is placed along the top of

it, so that animals may see the obstruction in their way; and it is said that such means of protection are frequently placed there. If the visible capping or coping will remove the cause of danger, and can be properly applied, there is much reason why it should be used.

It is said there is an objection to the use of the capping; firstly, because it enables people to get over the fence, and in doing so they break the wires down, and it is a fence which is easily injured in that way; and the railway companies further say, that it enables fire, if carried from their track to the fence, to be carried along the top piece into the fields, and woods, and farm fences, and do and cause damage to be done which would not be done if the continuous wood piece were not there.

In some parts of the United States, and in the North-West part of our own country, wood cannot be found for fencing, and nothing but wire can be got for the purpose; and to make the wire fence of any use it must be barbed, and we know from the evidence in this case, and from the knowledge which we have in common with people generally, that the barbed wire fence is in very commonuse, and it is said to be coming into still more general use. It is also much cheaper than any other kind of fence, and more durable. The capping is very frequently not usedand although the fence without the capping has been in use for some years, it is not known to have been found specially dangerous.

In the case referred to and commented upon in the Albany Law Journal, the barbed wire fence was put up partly *across a public highway*, so as "to beset the travel of the country." In the case in 62 Georgia Reports the Court did not say the barbed wire fence was a nuisance, but that where such a fence was erected about the line of railway the railway company was bound to use care "and the proper measure of diligence" not to frighten or drive live stock upon the wire fence from the running of their trains; and that it was no less incumbent on the company to act with that degree of care not to frighten the cattle upon the wire fence, than it was to avoid doing them injury if they happened to be upon the railway track.

And in the case of the *Great Western R. W. Co. v. Davies*, although there was some danger to be apprehended from the use of the fastening of the gate, and although the cow was killed by being driven against that fastening while fighting with another cow, the Court was of opinion the company was not to blame for continuing the use of that fastening : 1. Because it was not intrinsically or necessarily dangerous. 2. Because it had been in use there for nine years without any mischievous consequences ; and 3. Because it was a kind of fastening in common use and general use elsewhere as well as along the company's line. If these fences, even without the top piece, are for the public convenience ; and if they are not, or are not appreciably more dangerous than the common rail fence ; and if accidents from them are not more frequent than from the rail fence ; and if they are in common use and are coming more into use, there is no reason why they should not be allowed. They cannot, I think, be said to have no inherent danger about them ; the barbs are sharp, and they are put there because they are sharp and will inflict injury ; that is in fact because they are dangerous.

But I am not satisfied the barbs, although put on the wire for the purpose mentioned, are more dangerous than the ends of the common rail fence, although they are not made or placed as they are purposely to be a source of danger ; but protruding as they do, and many of them pointed, they make the fence a really dangerous erection, and I doubt whether they would be allowed in a country in which they had not theretofore been used. They would be a nuisance along the sidewalks of this city, or along the sidewalks of most of the towns and villages of the province, but they are not found to be so in the country parts. I am rather inclined to the opinion that if the top rail or capping would enable the fence to be better seen by men or animals, and more particularly by animals, as they are impressed more by a noticeable or solid obstruction than men are who may be deterred by a mere notice of spring guns, although there is no fence, that the top rail or

capping should be put upon the fence. Whether it would meet the objection to that kind of fence may require time to determine.

I am disposed to allow of the barbed wire fence as a great improvement in fencemaking in all places where it can properly be used, as on country highways, and perhaps as party fences. It is free from the risk of fire, and from the certainty of its carrying and spreading the fire. It is easily and economically made. It supplies fully, and with no loss of land or room, the old-fashioned fence. It supplies also the place of rail and other fencing timber which, even in many parts of this province, is becoming dearer and scarce, and it prevents the growth of and shelter for weeds in the numerous corners of the old snake fence.

And it is right we should keep pace with the requirements and improvements of the age. The general convenience, when private rights are not infringed, is a sound rule of law and a good foundation for a judgment. See *Ram on Legal Judgment*, by *Townshend*, ch. 6.

Deer were formerly not distrainable for rent, but when they were kept for and turned to profit it was held they might be distrained. "When the nature of things changes, the law must change too :" *Willes 48.*

Hops were formerly treated as a weed, and were held not to be within the statute against regrators, but when they became a common necessary of life, they were adjudged to be within the statute : *King v. Waddington*, 1 East. 155-6.

Coal was at one time deemed to be a nuisance, and on petition the King, in the time of Edward II., issued a proclamation against the use of it in London, but the scarcity of wood, and the public necessity and convenience brought it into general use : *Chambers' Encyclopaedia*, tit. *Coal*.

So also Street Railways, which are in many respects a very great obstruction to the free use of the highway, and even a very great nuisance, are yet sanctioned by the Legislature, and are accepted by the public, not because they

are wholly unobjectionable, nor because they are an unmixed benefit, but because their convenience far outweighs their many serious inconveniences. And so it is throughout life generally, the bad must go with the good, the inconvenient be balanced by the convenient, and the greatest amount of good be obtained and enjoyed with the least reasonable degree of drawback or detriment.

I should be disposed to send the case again to have it more fully tried, as a case of very great consequence, and if necessary by a special jury, before pronouncing absolutely upon so serious and important a matter; and the question should be whether the barbed wire fence is a dangerous fence or nuisance, and if so, whether it can be made a reasonably safe and proper fence by a top rail, or by any other means, and if so by what means?

I have not yet referred to the legislation on the subject.

The R. S. O. ch. 174 sec. 461, sub-sec. 13, enacts that every township, city, town, or incorporated village, may pass by-laws "for regulating the height, extent, and description of lawful division fences." That does not apply to fences along highways, but the proprietors will take care not to leave their farms open to the highway. The 45 Vic. ch. 23 (O.) adds another sub-section (13a) to sec. 461, which is, "For providing proper and sufficient protection against injury to persons or animals by fences constructed wholly or in part of barbed wire or any other material." The whole enactment is now contained in 46 Vic. ch. 18, sec. 490, sub-secs. 15, 16 (O.) The last sub-section will apply to all barbed wire fences.

That enactment assumes there are "barbed wire fences constructed." It would be difficult in the face of that enactment to treat them as a nuisance. It seems to sanction them, and to give power to the municipal councils to provide proper and sufficient protection against injury to persons or animals from them.

The township of Augusta in which this accident happened has not passed any by-law with respect to these fences.

The evidence which was offered that in other townships these fences were in common use, and that other municipalities held out inducements and offered a bonus to each person who put up a fence of the kind, was excluded, and I think such evidence should have been received, for the objection was to shew they were in common use, and were not considered to be dangerous, nor a nuisance.

I am of opinion, upon the evidence and upon the statutory enactment, the fence in question, constructed as it is upon an ordinary country road of the Township, cannot be treated as a nuisance, and that the defendants are entitled to judgment ; but if there be any doubt of it, I am of opinion there must be a new trial to obtain all the evidence which can be given as to the general use of these fences throughout the Province, and if protected, how they are protected, and what protection, if any, has been given by by-law of any municipality against injury to be apprehended from such fences. Upon the other part of the case I am of opinion the colt, five weeks old, following the mare which was led by the halter, cannot be said to have been running at large upon the highway. It was not necessary to have a halter upon the colt, or to have carried it in a waggon, as calves that are taken to market.

No one ever saw a colt of that age in a halter : they everywhere in the country are allowed to follow the dam, and the universal custom in such a case ought to give the rule. The cases of *Markham v. The Great Western R. W. Co.*, 25 U. C. R. 572 ; and *Cooley v. Grand Trunk R. W. Co.*, 18 U. C. R. 96, are decisions upon full grown animals being at large.

But there is no necessity for a new trial. Judgment will be for the defendants with costs. (a)

ARMOUR, J., concurred.

(a) See *Boggs v. The Missouri Pacific R. W. Co.*, Central Law Journal, June 19th, 1882, p. 62.—REP.

O'CONNOR, J.—I still adhere to my original opinion, that the barbed wire is a dangerous fence, unfit for such a place as the one in question is in, and that it is maintained by the defendants at their risk, if any damage be caused by it. I do not consider it necessary to go so far as to say such a fence is a nuisance.

I think evidence of the toleration of such fences elsewhere, whether by permission of by-laws or otherwise, is not admissible. There may be reasons for such toleration in some places which do not apply to others.

I do not think the clause of the Municipal Act referred to affects the question either way.

Judgment for the defendants, with costs.

[QUEEN'S BENCH DIVISION.]

BECKETT V. GRAND TRUNK RAILWAY COMPANY.

R. W.'s and R. W. Cos.—Track crossing not fenced—Unlawful rate of speed—Accident—Contributory negligence—Common law liability—Life policy—Deduction from damages.

The plaintiff's husband was driving in his wagon along the highway, in the town of Strathroy, where it crossed the defendants' line of railway, which was there unfenced. As he approached the track he did not observe any stir among the railway employees or others there, or any other signs indicating the approach of an expected or coming train. There was a curve in the line about a mile to the west, beyond which a train could not be seen, and there was strong evidence that the view which he might have had for some distance westward was obstructed partly by cars placed by the railway employees on the side tracks, and partly by a baggage house and other obstructions, so that he could not see far enough to enable him to avoid a train running at the rate of thirty-five miles an hour, as the defendants' train was at the time. The train in question was a fast train, but recently established, which there was no direct evidence that he had ever seen passing through the town, or that he knew of. There was apparently credible evidence that after the locomotive came within hearing distance there was no sound of bell or whistle until it was so near the crossing that there was only time for two short sharp whistles, when the collision with the wagon took place, which caused the death of the plaintiff's husband and the destruction of both horses and wagon. The alleged obstructions and the neglect to ring the bell or sound the whistle were strongly controverted by defendants' witnesses, though the evidence for the defence rather corroborated the plaintiff's witnesses in those respects: *Held*, that it was altogether a case for the jury, and as it was fairly presented to them and upon questions fairly put to them, which they had answered, finding in the plaintiff's favour, the Court would not interfere with their verdict. *Held*, also, that there was no contributory negligence on the part of the deceased.

Per O'CONNOR, J., that the defendants were, under the circumstances appearing, not only liable in damages, but to a criminal prosecution as well.

Per O'CONNOR, J., that the Consol. R. W. Act 1879 (42 Vic. ch. 9 (D).) as to the ringing of the bell and sounding the whistle, does not apply to the Great Western Division of the Grand Trunk R. W., but that that division of the railway still remains liable to sec. 144 of Consol. Stat. Can. ch. 66, restricting the rate of speed to six miles an hour of locomotives passing through any thickly peopled portion of any city, town, or village, where the track is not properly fenced.

Per WILSON, C. J., that independently of any statutory enactment the defendants were running their train too rapidly for the public safety at the place in question, and they must be governed by the same rules as ordinary vehicles and teams using roads which meet and cross each other, and which, while providing each for its own safety, must also provide for that of the others, and each having the same but no higher rights and privileges than the others.

Held, also, [WILSON. C. J., dissenting] that a policy of insurance for \$3,000 on the life of the deceased had been improperly directed by the learned Judge at the trial to be deducted from the damages assessed by the jury.

Per WILSON, C. J., that the whole amount of such policy should be deducted; but, in any event, such deduction should be made as would represent the probable premiums payable had the deceased lived, as also the interest upon such premiums.

THIS was an action brought by the widow, as administratrix, of Michael Beckett, on her own and her children's behalf, to recover damages for the pecuniary loss and injury sustained by them in consequence of the death of her husband.

The second paragraph of the statement of claim stated that the deceased was on his return home from the town of Strathroy and necessarily driving across the line of the defendants' railway, with horses and wagon, at a crossing on Metcalfe street in said town, and although all proper care and precautions had been taken by him, a railway train under the charge of the defendants' servants was illegally, wrongfully, and negligently run or brought into collision with the team of horses and wagon driven by the said Michael Beckett, whereby the said Beckett was thrown from the wagon and instantly killed, both horses being also killed, and the wagon destroyed.

The third paragraph stated that the said railway train was being run through, and the crossing was situated in, the thickly peopled portion of the said town, at a greater rate of speed than six miles per hour, although the track, of the said railway was not fenced, contrary to (*i. e.*, as required by) the provisions of the statute in that behalf.

The fourth paragraph stated that the defendants did not ring the bell or sound the whistle of the engine at intervals until it had crossed the highway.

The defendants pleaded not guilty "by statute."

The case was tried at the last Autumn Assizes at London before Wilson, C. J., and a jury, when no less than sixty witnesses were called and examined.

It was admitted that the train was passing through the town at a high rate of speed—thirty-five miles per hour. Several witnesses, who were in positions to hear, swore that no bell was sounded within a distance of eighty

rods and more; several swore that the whistle was not sounded until the train was within about six seconds of the crossing; others described the sound of the whistle as almost instantly before the collision; while one witness, looking on at a very short distance, heard the whistle sound hurriedly "toot, toot," and instantly after saw the engine strike the wagon.

Considerable evidence was also adduced to prove that the view along the railway westward was obstructed by a baggage house and other fixed objects, which made it impossible for a person crossing the track to see beyond a very short distance, so that after the engine came in view, going at the rate of speed of that train, it would be practically impossible for a person, seated in a wagon and driving a team across as the deceased was, to escape. But it was also proved that on that occasion the view was further obstructed by cars standing on the tracks beside that on which the express train was passing.

The greater part of the evidence was strongly controverted. The conductor of the train said he heard the bell and whistle; the engine driver heard the same, and the fireman rang the bell for a mile or more continuously up to and through the station, and heard the whistle three times. Several servants of the defendants and others at and about the station heard the whistle, but, except two or three, did not see or hear the bell.

The facts are further stated in the judgment.

The following questions were submitted to the jury:

1. Did the persons on the train omit to whistle or sound the bell eighty rods east of Metcalfe street crossing, and to keep the same sounded at short intervals up to the time of the accident? A. Yes.
2. Was the deceased driving at the time immediately before and up to the time of the accident, with proper care in approaching the Metcalfe street crossing? A. Yes.
3. Could the deceased, by the exercise of proper care on his part, have avoided the collision? A. No.

4. Did the company do what was reasonable and proper, considering the high rate of speed of the train, and the locality through which it was passing, and the probability of persons using these crossings, to warn or protect the public from danger or injury from the train? A. No.

5. If not, in what respect did they fail to take such reasonable and proper precautions? A. 1st. By not having flagmen at the crossing. 2nd. By not ringing the bell continuously, or not whistling at short intervals.

6. What, in your opinion, was the cause of the accident? A. 1st. Obstructions on the track. 2nd. The want of sufficient warning from the train. 3rd. The very high speed at which the train was running.

7. Was there any car standing on the through siding at the time of the accident? A. No.

8. Was the train passing through a thickly-peopled portion between Fawcett's crossing and Metcalfe street? A. Yes.

9. Was the railway track (omitting the highways) along the parts in question, properly fenced? A. Yes.

10. What, if any, pecuniary loss has been sustained by the death of the husband and father? A. \$3,000.

A verdict was thereupon returned for the plaintiff for \$6,000, but that was reduced by \$3,000, the amount of a policy of assurance on the life of the deceased, which left a balance of \$3,000 to be apportioned, and which was apportioned between the plaintiff, the widow and three of the children who were under eighteen years of age. The jury also allowed \$250, as the value of the horses and wagon.

November 20, 1884. *Bethune*, Q. C., obtained an order *nisi* to set aside the findings and verdict, and the judgment thereon, and to enter a nonsuit or judgment for the defendants, on the ground that no cause of action was shewn against the defendants: that deceased was guilty of contributory negligence, as he should have looked out for any passing train, but did not; or for a new trial on the law

and evidence and weight of evidence, and that the finding as to the whistle and bell was an immaterial issue, as sec. 104, ch. 66, C. S. C., did not apply to the part of the railway where the accident happened; also on the ground that the defendants were not bound by the Railway Act of 1879, or by any Act requiring the bell to be rung or whistle to be sounded on approaching a road crossing, and therefore the absence of these acts was not a breach of duty on their part, though if so bound, they did so; also for misdirection; and for excessive damages.

Folinsbee, for the plaintiff, also obtained an order nisi to increase the verdict by \$2,500, on the ground that the value of the life policy was wrongly deducted in assessing the damages.

June 25, 1885.—*Bell*, Q.C., and *Osler*, Q.C., for the defendants. The Great Western Railway Company are not bound under the statute to ring the bell at the crossings, and the party complaining must, on his part, take reasonable care. On the findings there should have been a nonsuit. The defendants were not guilty of any unlawful exercise of their rights. Deceased's duty as much as defendants' was to see that there was no danger. He was guilty of contributory negligence. See *Wright v. Midland R. W. Co.*, 51 L. T. N. S. 539, and cases there cited. See also *Johnston v. Northern R. W. Co.* 34 U. C. R. 432, 439; *Hicks v. New Port, &c., R. W. Co.*, referred to in 4 B. & S. 403; *Pym v. Great Northern R. W. Co.*, 2 B. & S. 759, 4 B. & S. 396, 403; *Bradburn v. Great Western R. W. Co.*, L. R. 10 Ex. 1. All circumstances, such as life insurance, &c., may be taken into consideration by the jury. The charge was right as to the amount. The verdict was much larger than the evidence justified, and therefore there should be a new trial. See *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. 162. If the Act does not apply then there was the right to run at any rate of speed, and there should be a new trial. The duty is cast on the municipality to render the highway

safe, and they, if any, are responsible for any accident, and the resort must be against them. See *Renaud v. Great Western R. W. Co.*, 12 U. C. R. 408; *Moison v. Great Western R. W. Co.*, 14 U. C. R. 102; *Purnell v. Great Western R. W. Co.*, 4 C. P. 517; *McDowell v. Great Western R. W. Co.*, 6 C. P. 180; *Nicholls v. Great Western R. W. Co.*, 27 U. C. R., 282. There was no evidence of any care exercised by the deceased. Before coming into a position of peril he could have put himself in one of safety by the most ordinary care, but he did not do so. Then, on the question of negligence, supposing the statutes to apply, there was no affirmative evidence that there was no whistle or ringing of the bell; on the contrary, there were eight who swear to the bell and twenty-three to the whistle.

Meredith, Q. C., and *Folinsbee*, contra. As to the life assurance, see *Hicks v. Newport R. W. Co.*, already cited. See also *Althorpe v. Wolfe*, 22 N.Y. (App.) 355; *Harding v. Townsend*, 43 Vermont 536. Then, as to the statutes applying, it is contended that they apply both as to the ringing of the bell, and also as to the whistle. See 16 Vic. ch. 101; 14 & 15 Vic. ch. 51, sec. 3; 34 Vic. ch. 44; 35 Vic. ch. 65, secs. 4, 5; *Maxwell on Statutes*, 279. 42 Vic. ch. 9 (D), is applicable to this company; and see 47 Vic. ch. 11 (D). The Legislature intended that all railways should be brought under 42 Vic. ch. 9 (D), Consol. Stats. Can. ch. 66, sec. 144, may also be referred to. They also cited *Renaud v. Great Western R. W. Co.* 12 U. C. R. 408; *McDowell v. Great Western R. W. Co.* 6 C. P. 180; *Peart v. Great Western R. W. Co.* 10 A. R. 191.

June 30, 1885. O'CONNOR, J.—The Dominion Act, "The Consolidated Railway Act, 1879," provides that its clauses "from section five to section thirty-four inclusive shall apply to every railway constructed, or to be constructed, under the authority of any Act passed by the Parliament of Canada." Counsel for the plaintiff argued that the expression "Parliament of Canada" meant not only

the Parliament of the Dominion of Canada, but the Parliament of the late Province of Canada also. But this cannot be, for before confederation there never was a "Parliament of Canada." The third section of the British North America Act, 1867, declared that "the Provinces of Canada, Nova Scotia, and New Brunswick, shall form and be one Dominion under the name of Canada." Section seventeen declares: "There shall be one Parliament for Canada consisting of the Queen, an Upper House styled the Senate, and the House of Commons."

The expression "the Parliament of Canada" is afterwards used throughout the Act.

The Imperial Act, 3 and 4 Vic. ch. 35, 1840, united the two Provinces of Upper and Lower Canada, and declared that they should form and be one Province, under the name of the Province of Canada. The third section provides "one Legislative Council and one Assembly," to be called "The Legislative Council and Assembly of Canada." This title was used throughout that Act; and in all Acts passed by the Legislature of the Province of Canada the authority was expressed to be "the Queen by and with the advice and consent of the Legislative Council and Assembly of Canada," not of "the Parliament of Canada."

It may, therefore, be safely concluded that the expression, "any Act of the Parliament of Canada," used in an Act of the Dominion of Canada, means only an Act of the Dominion.

The Consolidated Railway Act, 1879, first above mentioned, does not apply to that portion of the Grand Trunk Railway which was formerly called the Great Western Railway, which is now the Western Branch of the Grand Trunk Railway.

The Dominion Act of 1884 does so apply, but nothing therein affects this case.

The Act 35 Vic. ch. 65 (of Canada), 1872, by the 5th sec. thereof, declared the Great Western Railway to be for the general advantage of Canada; and that it should continue to be subject to the provisions of "*The Railway Act*,"

forming chapter 66 of the Consolidated Statutes of Canada, except those contained in the sections between the second and one hundred and twenty-fifth, both inclusive.

The Great Western Railway therefore remained subject to the provisions of the 144th section of "*The Railway Act*," being chapter 66 C. S. C., which section provides that: "No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village at a speed greater than six miles per hour, unless the track is properly fenced."

A clause in one of the original Acts, which constituted the charter of the Great Western Railway Company, imposed on that company the duty of fencing their line of railway.

A few years ago, the date is not mentioned, *The Great Western* amalgamated with and became absorbed in the Grand Trunk Railway Company, and it has since been operated as the Western Division of the Grand Trunk Railway.

Thus it appears matters stood on the 23rd of June, 1884, when the accident out of which this suit has arisen occurred at Strathroy, a town on the Western Division of the Grand Trunk Railway.

On that day Michael Becket, a well to do farmer, who resided about thirteen miles from Strathroy, had started for home with a span of horses and a wagon in which he rode, and was crossing the railway which passed through a part of the town, when he was struck and instantly killed by a fast express train going eastward: the horses were also killed and the wagon smashed. Beckett was a man of family and died intestate, leaving his widow and five children, four of whom were infants under twenty-one years of age, him surviving.

In making out on the one hand, and repelling on the other, a case of negligence against the defendants much was said, and a large number of witnesses were examined respecting the ringing of the bell and the sounding of the

whistle, or rather the omission to do either, continuously, or at frequent intervals: and the statute requiring this to be done was frequently spoken of, and finally the Chief Justice mentioned it in his charge to the jury as an important ingredient in the case, apparently without objection by counsel on either side until the close of the case, when counsel for defence raised the question.

It is now contended that the statute in that behalf does not apply, and that it is impossible to say how far the jury were influenced by that mistake in rendering their verdict, and that a new trial ought to be granted on that ground, without reference to any other.

I cannot accede to this proposition, because although the first question propounded to the jury was founded on that mistake, and was answered unfavourably to the defendants, yet the second, third, and fourth questions covered the whole case fully, irrespective of the first question; so that the first question was unnecessary, and the matter thereof immaterial and nugatory. Besides, although the statute did not apply to and was inoperative to bind the defendants in the particular instance, yet it might fairly and properly be referred to as indicating one of the modes in which the defendants might exercise reasonable care and caution to avoid accident at such a place as that where the accident happened; in fact it is the only means at the disposal of the engine driver, or other person in charge of the train, by which notice can be given of the near approach of an advancing train.

It may therefore be truly averred that though the defendants were not bound by statute, they were bound by reason, and so by law, to give that kind of warning. I therefore fail to perceive that the defendants suffered, or that they could suffer, any detriment from the matter of the first question, or from what occurred with reference thereto at the trial.

It may well be said, as Cockburn, C. J., said in *Tuff v. Warman*, 2 C. B. N. S. at page, 754, commenting on *Morrison v. The General Steam Navigation Co.*, 8 Exch.

733, and *Dowell v. The Same Co.*, 5 E. & B., 195, wherein statutory obligations were involved: "In the former of these cases the Court of Exchequer distinctly lays it down that the regulations in question have effected no change in the law, but that all persons navigating vessels are bound to exercise ordinary care and vigilance just as before; and that if it be clearly established that a vessel having no light has been run into by another vessel by sheer carelessness and negligence in not keeping a proper look-out, the party sustaining damage is entitled to compensation. That shows that all that the statute has done is to bring within the category of negligence the non-observance of the regulations prescribed by s. 296; and that in the event of accident arising from such non-observance, the case stands precisely the same as it did before, and the question is to be tried by the ordinary rules." The rule here enunciated applies to the present case, and ignores the notion of prejudice to the defendants.

The questions of culpable negligence by the defendants, and of contributory negligence by the deceased, were fought out at great length with considerable ability, and some asperity: a large portion of the evidence had reference to those questions.

On the point of the ringing of the bell and sounding the whistle, and in other respects, such as obstruction to the view by cars on the sidings, the evidence for the defence is not wholly consistent, and is in some parts contradictory. But aside from all this, or rather in connection therewith, the jury were permitted to examine the place of the accident, and to satisfy themselves by personal inspection regarding some of the facts in controversy.

Upon the findings of the jury upon conflicting evidence only one verdict and judgment, namely for the plaintiff, could properly be entered. It is a well-established rule that the finding of the jury upon such evidence is final and conclusive, and will not be disturbed by the Court, except extraordinary circumstances supervene, such as do not exist in this case.

Here the case might, as regards the liability of the defendants for damages for causing the death of the deceased, be permitted to remain; but the defendants complain strongly of injustice, and urge that the findings and verdict of the jury injuriously affect their chartered rights and privileges, and improperly interfere with their running traffic and business arrangements entered into and made according to the object and spirit of the Acts of Parliament which constitute their charter. It may therefore be well to enter into and consider the merits of the case more fully.

The defendants say that in order to keep up with the spirit of the times, which manifests itself in a desire for fast travelling and long journeys, they are compelled to make arrangements with other railways which require that they run a fast express through at a high rate of speed, which has to be kept going at full, or nearly full speed, even through towns along the line.

This is very well. The Acts of incorporation secure these rights and privileges to the defendants; but reason suggests and the general law of the land imposes a condition which is both important and necessary; that is, that the defendants shall use their corporate rights and privileges in such manner as not to be unnecessarily injurious to the public, in such manner as not to be absolutely dangerous to, not to say destructive of, life and property. Thus the law, the common law, imposes on the defendants a general duty to be defined by the Courts as occasion requires.

But in addition to this the statute relating to the corporations enjoins one of two specific duties; namely, to fence the line of their railway throughout, or failing that, to run their trains through the thickly peopled portion of any city, town, or village at a rate of speed not greater than six miles per hour. These provisions are however merely regulations, which, as was said in *Tuff v. Warman*, have effected no change in the law. They are mere specifications of two of many means which may be resorted to for

the prevention of accidents; but, as they are specifically enjoined as a duty, they are also made imperative, at least in the alternative, and brought within the category of negligence. In *Parnell v. The Great Western R. W. Co.*, 4 C. P. 517, Chief Justice Macaulay said: "I think that the Act imposes upon defendants the burthen of erecting and maintaining sufficient fences upon the line of the route of the railroad where it crosses the highway.

It is said the defendants could not obstruct the highway by fences or gates on each side, in addition to the railroad, without committing a nuisance. If authorised and required to do so, it would not be a nuisance if proper facilities for travellers to pass were afforded; but if otherwise, it would seem to follow the defendants should fence off, with swing gates or otherwise, that part of the line of the railroad which crosses highways from the other parts, on both sides of the highway, so that the passage of the highway might remain open and free to travellers, unless when trains were passing, and defendants' gates or fences open for that purpose."

Richards, J., concurred with the Chief Justice, and added: "The necessity for some means to prevent injuries arising from the want of fences, is quite as great and obviously as necessary, where the route of the railway crosses the public highway as any where else, if not more so; and I cannot suppose that the legislature did not intend to compel the company to take such steps as would prevent accidents and injuries at these crossings." This case followed the case in the Court of Queen's Bench, *Renaud v. The Great Western R. W. Co.*, 12 U. C. R. 408, wherein the judgment of the Court was delivered by Robinson, C. J.

Had the railway been fenced with gates across the highway, to be closed only when trains were passing, or if the train had passed through at no greater rate of speed than six miles per hour; or if, as the jury suggested, a flag-man had been there to give notice of the approach of the train, and insist on the way being made clear, the accident could

hardly have happened ; at least, the chances of such a collision would be reduced to a mere possibility. Notwithstanding these provisions, however, and the company's total disregard of the duties imposed by statute, that is, their failure to fence, and yet insisting on passing through at a very high rate of speed—six times the rate allowed—it is a fact which appears to be unaccountably strange that no other means were adopted, nor was provision made for the use of any other means, of notifying persons travelling on the highway at or near a crossing of the approach of a fast train: not even a red flag or a movable sign board was provided or used for that purpose.

Such being the position of the defendants in the case, they allege, and rely on it with apparent confidence, as a defence, that the deceased was guilty of that kind of contributory negligence which relieves them from liability.

It is not easy to solve the difficulty presented by the terms of culpable negligence, on the one hand, and contributory negligence on the other. It may be stated, in general terms, that culpable negligence is such as renders a party guilty of it liable to another having equal rights for the consequences of the negligent act or omission.

In this case, the defendants having chosen to disregard their statutory duty to fence, and having assumed the responsibility of running fast trains through a thickly peopled portion of the town contrary to a statutory prohibition, were bound to use precautionary and preventative means of a kind equivalent to those which the statutes imposed on them, but which they disregarded, for the protection of the public. Herein they failed in the present case, and that of itself amounted to culpable negligence which at least *prima facie* rendered them responsible for the unhappy results of the collision, and liable not only for damage in a civil action, but in my opinion to a criminal prosecution also. As regards the defendants' liability to damages in a civil action, *Renaud v. The Great Western Railway Co.*, and *Parnell v. the same*, are direct authorities.

From this liability the defendants might be relieved if the deceased acted, that is, approached and went upon the railway with total carelessness, with want of *ordinary* care; and if that carelessness contributed directly and immediately to the collision. In short, to relieve the defendants from their *prima facie* wrongful position, the negligence of the deceased must have been an integral or component part of the complex notion which was the *causa causans*.

This appears distinctly to be the meaning of the Court in *Tuff v. Warman*.

In *Dowell v. General Steam Navigation Co.*, 5 E. & B. 195, Lord Campbell, C. J., at p. 206, says:—"In some cases there may have been negligence on the part of the plaintiff remotely connected with the accident; and in these cases the question arises whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff."

Speaking of statutory regulations for the prevention of accidents, his Lordship said in the same case: "It is the duty both of jurors and judges, in obedience to the Legislature, for the safety of navigation, and in furtherance of the cause of humanity, to take care that these regulations are duly enforced."

Stapley et al. v. The London, Brighton, and South Coast R. W. Co., L. R. 1 Ex. 21, is another authority strongly supporting the plaintiff in the present case. To the same effect is *Bilbee v. The same defendants*, 18 C. B. N. S. 584.

In *Radley v. London and North Western R. W. Co.*, L. R., 1 App. Cas. 754, the Judge who tried the case directed the jury that the plaintiffs must have satisfied them that the accident happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely the negligence of the defendants' servants. This was held a misdirection, and a new trial was ordered. Lord Penzance, in delivering the unanimous judgment of the Court, Lord Chancellor Cairns presiding, said: "The first proposition is a general

one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established; and it is a qualification upon the first; namely, that though the plaintiff may have been guilty of negligence, and though that negligence may, in fact, have contributed to the accident, yet if the defendants could in the result, by the exercise of ordinary care and diligence, have avoided the mishap which happened, the plaintiff's negligence will not excuse him." And after stating a preliminary part of the Judge's charge he continued: "The learned Judge then went on to describe to the jury what it was that might properly be considered to constitute negligence, first in the conduct of the defendants, and then in the conduct of the plaintiffs; and having done this he again reverted to the governing propositions of law, as follows: 'There seem to be two views. It is for you to say entirely as to both points. But the law is this, the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs; if you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants.'

This, again, is entirely without qualification, and the 'undoubted meaning of it is, that if there was any contributory negligence on the part of the plaintiffs, they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of *Davies v. Mann*, and the other cases above alluded to, and in no part of the summing-up is that doctrine anywhere to be found." See the same case L. R. 7 Ex. 71, where the Court decided that point in the same way.

Smith on Negligence, ed. of 1880, p. 156, says: "It cannot be considered to be contributory negligence if the

plaintiff has merely not anticipated the defendant's negligence, for the plaintiff has a right to presume that the defendant is going to act with ordinary care until he has some notice to the contrary, when it becomes his duty to take ordinary means to avoid it ; that is, such means as a prudent man ought to take." * * The defendant is not excused merely because the plaintiff knowing of a danger caused by the defendant voluntarily incurs that danger. The circumstances are for the jury. If the plaintiff negligently incurs such danger ; that is to say, not acting as a reasonable man would do, he cannot recover. Nor is it any excuse for the defendant to say that the plaintiff is doing something illegal, unless he can add that the doing so contributed materially to the accident."

To the like effect is *Underhill* on the Law of Torts, 4th ed., "Contributory Negligence," Rule 29 (3) p. 171, where the cases are collected ; also 2 *Thompson* on Negligence, pp. 1148, 1149, 1150, secs. 3, 4, 5.

Sherman and Redfield on Negligence, 3rd Amer. ed., p. 577, note 3, says : "No fault can be imputed for not looking in a direction where nothing could be seen, especially if the obstruction is caused by the defendant itself : *McGuire v. Hudson River R. W. Co.*, 2 Daly 76."

With the view of the law thus obtained I proceed to consider the facts of this case with reference to negligence and contributory negligence.

The deceased was a farmer residing in the country about thirteen miles from the town of Strathroy, who visited that town occasionally on business. There was no evidence that he had ever seen the fast train passing through the town, or that he knew of it. It had not been very long established ; and even some of the witnesses who lived in the town had known of it but a short time, and did not know the time of its passing, did not know for certain whether it passed through or stopped at the station ; in fact knew little about it.

The deceased was in town on his ordinary business, and started in the evening to return home ; the road crossed

the railway ; as he approached he did not observe any stir, activity or commotion among the railway hands, or others at or about the station, or any other signs indicative of an expected or approaching train ; there was a curve in the line of railway about a mile westward beyond which a train could not be seen ; he had a right to expect that even a through train would not pass through the town at a faster rate of speed than six miles per hour ; he knew, if he knew anything about the trains, that all other trains stopped at the station, a short distance west of the crossing ; strong evidence was adduced to show that the view which the deceased might have had some distance westward was obstructed partly by cars placed on the side tracks by the company's servants, partly by a baggage house and other obstructions, so that the deceased could not see far enough to enable him to escape from a train running at the rate of thirty or thirty-five miles per hour. It was sworn to by several witnesses, apparently credible, that after the engine came within hearing distance there was no sound of bell or whistle until the engine was so near the crossing that there was only time for two short whistles, described as a " *tut, tut,*" and then a crash—*the collision*, killing the man and horses and destroying the wagon. Some of these facts, were stoutly controverted by witnesses for the defence, the alleged obstruction and the neglect to ring the bell and to sound the whistle especially so. Yet the evidence of some of the witnesses for defence was rather corroborative of some of the plaintiff's witnesses even in those matters.

Altogether it was a case for the jury : it was fairly presented to the jury, and upon questions fairly stated, propounded to them, as has been already stated, they found in favour of the plaintiff : that finding the Court cannot without violation of law, settled by numerous authorities disturb. The verdict and judgment for the plaintiff will therefore stand, and the defendants' order *nisi* will be discharged, with costs.

There still remains the plaintiff's rule to be disposed of.

The jury under the direction of the learned Chief Justice deducted from the amount of the damages which they allowed for the death of the husband and father, \$3,000, the amount of a policy of insurance on his life. This notion appears to have been derived from a judgment of Lord Ellenborough, in a case of *Goodsall v. Boldero*, 9 East 72, which was acted upon as law without question for many years ; but it was at last called in question, and the fallacy pervading it was exposed by the case of *Dalby v. The India and London Life Assurance Co.*, 15 C. B., 365. It was the case of a creditor who insured the life of his debtor, in which life he had of course an interest. Before the death of the debtor the debt was paid, and after the death he claimed the amount of the policy. The Insurance Company refused to pay, considering the policy a mere indemnity for the debt, and that the creditor ceased to be interested when the debt due him was paid.

The Court held that a life policy in no way resembles a contract of indemnity ; it is a mere contract to pay a sum certain on the death of a person in consideration of the due payment of a fixed annuity for life, the amount of the annuity being calculated according to the probable duration of such life.

Deducting the amount of the policy in this case from the damages allowed for the death of the deceased, seems to me to treat it as an indemnity to the railway company, and leads to absurd consequences. For instance, if the policy was \$6,000, the exact amount of the damages, the company would be completely indemnified and have nothing to pay.

But suppose the policy was \$12,000 ; after paying the damages, \$6,000, there would be a balance of \$6,000 left.

Would that sum of \$6,000 go to the railway company or to the administratrix ? If the railway company are entitled to half of it to be applied to their indemnity, why not to the balance ? If they are entitled to have one-half applied to their use, why not the other half also ?

Have they not as good a right to say to the widow and children in this latter case as they are presumed to say in

the former, we are compelled by the law to pay you immediately the value of the life of the deceased to you ; the policy of insurance was intended to be such remuneration to you whenever he should die ; we pay you instead of the insurance company doing it. You have no right to be paid twice; we have been compelled by law to pay you immediately what you might not have got for years—perhaps you never would get it; we are entitled to subrogation, to take your place and demand and get the amount of the policy. Suppose the deceased had a life estate in certain land, his wife having the remainder in fee, would the railway company be entitled to be indemnified out of her estate in remainder for the widow's share of the damages ; at least, to the extent that according to actuary rules it would be worth to her during the time of the probable duration of his life, if he had not been killed by that accident ? And so by parity of reasoning, if the children were entitled to the estate in remainder. The *reductio ad absurdum* is evident, but applicable. It is in fact the application of an erroneous principle. It is true, the defendants get the benefit of the policy by way of subtraction from the damages, but that is indirectly giving them the benefit of the policy. The principle is the same.

A life policy of insurance differs in no respect from other property, except that it is not available to the assured himself, and is available to his family or others, for whose benefit it is intended only after the death of the assured. There appears to be no essential difference between it and a fund accumulated in a saving bank by annual deposits for the same purpose; nor is there a material difference between it and an estate in lands purchased by the deceased, with a life estate in himself, without power of disposal, and remainder over to wife and children, or others, for whose use he may intend it : nor, indeed, would the case be different if the deceased owned an estate real and personal, free from incumbrance, and of value equal to or greater than the damages ; for if he died intestate, as in this case he did, his children or heirs would share equally, and

his widow would take her dower of the realty and her share of the personality in advance of the time when they would take had the deceased continued to live subject to ordinary chances to die an ordinary death.

I think the plaintiff's order *nisi* must be made absolute, with costs, and the amount so added to the verdict should be divided between the same persons and in the same proportions as that divided at the conclusion of the trial.

WILSON, C. J.—It is, I think, useless to interfere with the finding of the jury upon the merits, notwithstanding the affidavit filed by the defendants shewing their engineer was mistaken to the prejudice of the defendants in part of the evidence he gave, which shewed the approaching train could be seen at a shorter distance from a particular view of it at a point past which the plaintiff must have passed, than it could in fact be seen from such point; because the jury were not I think really impressed by that mistaken evidence, and would almost to a certainty, if the evidence were corrected upon another trial, give at least the like amount of damages; and they are not I think excessive, considering the general nature of the evidence and the number of persons who are to be provided for.

I have only to make a few observations about the life policy money in this case which the husband had upon his life.

The case of *Pym, Administratrix, v. The Great N.R. Co.* 2 B. & S. 759, was that the husband was killed by accident to a railway carriage by defendants' negligence. He was possessed of personality to the amount of about £3,000 and tenant for life of an estate in land worth nearly £4,000 a year, with remainder to his eldest son in tail, and by settlement a jointure of £1,000 a year was settled on his wife, and £20,000 secured to the younger children on his death. The deceased died intestate. Held, the widow and younger children had a sufficient pecuniary interest in the continuance of his life to render its loss the ground of an action. The jury gave £13,000 damages, i. e., £1,000 for

the widow and £1,500 for each of the younger children, and that the amount for each of the children under the settlement should be reduced to £1,000.

Held, that if there be a reasonable expectation of pecuniary advantage, the extinction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action. It is for a jury to say under all circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money and so become the subject of damages in such an action.

It was also said the damages assessed were too large. At p. 769 it is said : " Considering that by the settlement provision is already made on the father's death for the widow and children, that it is uncertain how far the deceased would have added to their provision by saving from his income for their benefit, and that any such provision, whether under the settlement or otherwise, would not have come to them till the father's death ; while, on the contrary, both the money secured by the settlement and the compensation awarded by the jury now became realized at once, we think the amount of the damages, so far as the children are concerned, too large" The damages were directed to be reduced, otherwise a new trial would be granted.

In the Exchequer Chamber 4 B. & S. 396, affirming the judgment of the Queen's Bench, it was held, the remedy given by the statute is to *individuals*, not to a *class*, and on the death of a person whose income was derived from land, and personally independent of any exertion of his own, no portion of which was lost to his *family* by his death, the action is maintainable if in consequence of that death the mode of its distribution among the members is changed. The Court would not express any opinion upon the amount of damages, as that point had not been brought before them. It was stated by counsel on the argument

that the defendants had got the benefit of the settlement by the deceased of his estate by the reduction of the damages in the Court below. At the conclusion of the case Erle, C.J., who gave the judgment of the Court, said :

"According to the case sent to us the Lord Chief Justice told the jury, ' If after making allowance for what the deceased would naturally have expended on himself, they thought that a portion of his income beyond the £1,800 a year, to which his widow and eight younger children became entitled at his death, would have been from time to time set aside by him for the benefit of his family, or appropriated to their education and advancement in life, and would thus have secured to them advantages which by his death they had lost, that would constitute such pecuniary loss and damage as, coupled with the death of the deceased having been caused by the negligence of the defendants, would enable them to find a verdict for the plaintiff.'

If I was called on to take each of these items of damage relied on here and affirm that every one of them could be sustained, I should like more time for consideration, but if any one can be sustained it will be sufficient to uphold our decision."

There is nothing in the above case said about the money derivable by the widow and children of the deceased not being taken into consideration by the jury in assessing damages for them ; on the contrary, in the Queen's Bench the Court expressly states that the damages assessed were too large, "considering that by the settlement provision is already made on the father's death for the widow and children."

In the note in 4 B. & S., at p. 403, a case is referred to which was tried before Campbell, C.J., in which there was a policy on the life of the father, and he is reported to have directed the jury as follows :

"I think you should just consider what would be the sum if there were no insurances. What sum should you say ? That is entirely for you to consider. Well then if there be an insurance for £1000 by some company that in-

sured him against accidents by railways, and they being entitled to receive that sum upon that policy, it is quite clear that there ought to be a deduction from the aggregate amount in respect of that £1000. Then, with regard to the policies upon his life independently of accident, if you allow any deduction (and I think you will probably consider that some deduction ought to be allowed), it will only be in respect, I should think, of the premium that would be paid by the family, or which would have been paid by himself if this fatal accident had not happened."

I do not, in the absence of any decision expressly upon the question, assent to the direction given in the case last referred to, although I say so with great distrust of my own opinion when the contrary opinion has been stated by so able a lawyer and Judge as Lord Chief Justice Campbell. And I do not think the direction he gave to the jury is sustained by the decision in 2 B. & S. 759, for there a deduction was made from the *capital* money, whereas no deduction was made from the capital of the policy in the case before Lord Campbell. The value of the policy was estimated at what it would be worth when in the ordinary course of nature, according to the insurable tables, the life would probably fall in, and that would be ascertained by deducting from the face amount of the policy the premiums which would have to be paid upon it until, according to these tables, the policy would be payable; then from that amount a further reduction would have to be made for the interest to be deducted which would accrue upon the premiums presumed to be continued to be paid if the deceased had not been killed. It may be that other allowances should be made by way of deduction, for there was the risk of forfeiture by nonpayment of the premiums, and it may be from other causes. These amounts can be computed very accurately by an actuary. But I dissent even from that degree of deduction.

In my opinion the whole amount of the policy should be disallowed, because the widow and children are to that extent benefited pecuniarily by the death of the insured.

I do not see why the family should not be *so benefited* in the following cases: A bequest payable upon the death of A. to the wife of A., and to the children of that marriage which should be living at the time of his death. A. is afterwards killed by an accident attributable to the negligence of a railway company, and in an action by his personal representative it is proved that the family benefited by A.'s life to the extent of \$1,000 a year, but that they would benefit by the bequest becoming payable by his death to twice that amount. Is the representative for the individuals represented to recover a *pecuniary* compensation for the loss sustained ?

Where is the loss ? and what is it ?

It is manifest there has been a great *pecuniary* gain and benefit.

So an estate is settled in trust for the husband for life, and on his death for the benefit of his wife and children equally on his death, and the rents and issues of the estate are \$4,000 a year, and the husband is killed, and an action is brought under the statute in question for damages by reason of his death, and it is shewn that every farthing the husband had in his lifetime passed upon his death to his widow and children. Are damages to be recovered by the representative in such a case, when the family is *pecuniarily* benefited by there being one less of the number to be supported ? Or is no deduction or allowance to be made for the compensation claimed in either of these cases ?

In my opinion the whole of the policy money should be deducted from the damages assessed by the jury ; but in any event such deduction should be made from the amount as I have before referred to ; that is, for the probable premiums that would have to be made if the deceased had lived, and a deduction also for the interest upon these presumed payments of premiums.

As to the questions raised upon the statutes, that certain of them are not applicable in this action, I have not closely examined them, because the company, independently

of any Act of the Legislature, were driving along too rapidly for the public safety in such a place as that is where the accident happened, and they must be governed, independently of any statute, just as ordinary vehicles and teams using roads which meet and cross each other are governed; each vehicle, while providing for its own safety, provide also for the safety of other vehicles, all such vehicles having the like rights and privileges, but no higher title or claim than equal rights.

ARMOUR, J., concurred with O'CONNOR, J.

Defendant's order nisi discharged, with costs.

Plaintiff's order nisi absolute, with costs.

[QUEEN'S BENCH DIVISION.]

IBBOTTSON V. HENRY.

Replevin—Pound-keeper—Constable—Notice of action.

Replevin will not lie against a pound-keeper. In this case the sheep which were impounded were grazing upon an open common with the consent of the owner thereof, and were being herded by a boy in charge of them with a view to driving them home, when they were taken possession of by two constables, against the boy's remonstrance: *Held*, that the sheep were not "running at large," in contravention of a by-law of the municipality on the subject, and that the constables were liable in replevin for impounding them; but that replevin would not lie against the pound-keeper.

Held, also, that the constables were not entitled to notice of action,—*per* O'CONNOR, J.,—because, although they were public officers, it was no part of their duty as such officers to distrain and impound the sheep, even if they were "running at large" contrary to the by-law: they were merely "other" persons, who under the by-law were empowered to take and deliver to the pound-keeper. *Per* WILSON, C. J.—Unless some facts existed which might give rise to an honest belief that the sheep were at large, and unless they honestly believed that such a state of things existed, they were not entitled to notice of action, but such a state of facts did not exist under the evidence in this case.

THIS was an action of replevin brought by Robert Ibbotson against John Henry, Aaron Munson, and Thomas Hammill, alleging that the defendants in the village of

Arthur, in the county of Wellington, took the goods of the plaintiff, that is to say, forty-two sheep and forty-two lambs, and unjustly detained them against sureties and pledges, whereby the plaintiff had sustained damages.

The defendants entered a joint cognizance wherein they set up a certain by-law of the village of Arthur, providing what should be a lawful fence in the said village of Arthur, and enacting that no person being the owner of certain animals specified, amongst which were sheep, should allow them to run at large during any period of the year, and declaring that it should be lawful for the pound-keeper to impound any such animals running at large contrary to the by-law ; and also that it should be lawful for any person to take to the pound-keeper, for the purpose of having the same impounded, any animals so found running at large contrary to the by-law ; and providing that in the case of animals being impounded the pound-keeper should collect certain fines, and pay them over to the village Treasurer, and that the pound-keeper should also be entitled to certain fees in respect of such animals.

And the defendant went on to allege that at the time of the alleged taking of the plaintiff's sheep and lambs they were running at large in the the village of Arthur contrary to the provisions of the by-law, and that the defendant Henry, being the village constable, took the sheep and lambs so running at large, as it was his duty to do, from a certain unfenced and open plot of ground in the said village, and that he took them to the defendant Hammill, who was at that time the pound-keeper of the village of Arthur, and that it being necessary to call other persons to his assistance he called upon Munson, who was at that time the constable of the county, to come and help him ; and Munson accordingly assisted Henry in taking away the sheep, and the two then left them at the defendant Hammill's, who, as his duty was, forthwith impounded them ; wherefore all the defendants well acknowledged the taking of the sheep and lambs, and the defendant Hammill claimed \$50 for fines, and \$50 for fees in respect of the said sheep and lambs.

The action came on for trial on March 10th, 1885, before Armour, J., and a jury, at Guelph.

The by-law alleged in the cognizance was proved, and also the facts that the defendants were respectively constables and pound-keeper as alleged in the said cognizance; and the evidence further shewed that the plaintiff's sheep were at the time of being taken by the constable grazing upon a large unfenced plot of ground in the village of Arthur, bordered on one side by the road between the village of Arthur and the township of Arthur, which road was a travelled road. It appeared that the unfenced plot of ground was somewhat over 100 acres in area, and that the sheep were spread over an area of some thirty acres.

It further appeared that the plaintiff's son, a small boy of the age of fifteen, was at the time looking after the sheep, although it did not appear that more than a small number of them were immediately near him. At one end of the plot of ground a railway ran across, crossing the road between the village and the township.

The unfenced plot of ground in question appeared to be the property of one Anderson, who had given the plaintiff permission to graze his sheep on the land in question.

At the close of the evidence *A. H. F. Lefroy*, for the defendant, moved that the plaintiff be nonsuited, or the action dismissed, on the ground that replevin could not lie against Hammill, the village pound-keeper, under the circumstances, and that it would not lie against the other defendants, partly because they were officials acting in what they reasonably supposed was their duty, and for other reasons. The learned Judge, however, expressed the doubt whether running at large could be considered to apply to animals that were running upon one's own property, and were not proved to have been upon any highway. There being no dispute as to the facts, he said he would direct a verdict to be entered for the plaintiff, subject to the opinion of the Court ; and it was further agreed that in considering the correctness of his finding the Court might draw such inferences of fact

as it might deem material, and direct such amendments to be made on the record as it might think fit.

On the 21st of May, 1885, *A. H. F. Lefroy* obtained a rule *nisi* to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendants, or for a new trial, upon the ground that replevin would not lie against the pound-keeper, for when in the pound the sheep were *in custodia legis*; nor would it lie against any of the defendants, because they were all officials acting within what they supposed was the scope of their duties; and further, that it would not lie against the defendants, other than Hammill, because there was no joint detention of the sheep by them and the defendant Hammill, for the sheep were not in the possession of any other than the defendant Hammill at the time that they were replevied by the plaintiff. Also on the ground that the sheep were at the time that they were so taken to the pound running at large, contrary to the by-law above mentioned.

June 8, 1885.—*A. H. F. Lefroy*, for the defendants. It is important to understand the exact meaning of the Replevin Act 14 & 15 Vict. ch. 64. Before it was doubtful whether replevin would lie upon any mere tortious taking not in the nature of a distress: *Foster v. Miller*, 5 U. C. R. 505; *Chitty's Treatise on Pleading*, 16 Am. Ed. p. 184 (241). Trespass on the other hand will lie for any wrongful taking: *Chitty's Treatise* p. 191, note (a). Again, in replevin it was necessary not only to shew detention, but a preceding unlawful taking out of the possession of the owner: *Galloway v. Bird*, 12 Moo. 547; *Mennie v. Blake*, 2 Jur. N. S. 953; *Shannon v. Shannon*, 1 Sch. & L. 324. Trover, on the other hand, lies if there is a wrongful detention only: *Chitty's Treatise*, p. 172 (223); *Ib.* p. 181 (235). To extend the remedy by replevin to all cases where there has been a wrongful taking and detention, and to all cases where there is a wrongful detention, whatever the taking may have been, 14 & 15 Vict. ch. 64, now R. S. O. ch. 53, sec. 2, was passed. The statute was not

intended to alter the nature of replevin further than this : *Henderson v. Sills*, 8 C. P. 71-2 ; *Crawford v. Thomas*, 7 C. P. 67 ; *Miller v. Miller*, 17 C. P. 229 ; *Ferrier v. Cole*, 15 U. C. R. 561 ; *Deal v. Potter*, 26 U. C. R. 578. Replevin still remains a possessory action, as it always was. It is for the recovery of the article : R. S. O. ch. 53, sec. 2 ; *Chitty's Treatise*, 16 Am. Ed., p. 181-2 (236-238). Replevin is strictly a possessory action : per Foster, J., in *Mitchell v. Roberts*, 50 N. H. 486; *Gilbert on Replevin*, p. 82; *Wilkinson on Replevin*, p. 3. Hence it cannot be sustained against persons who have no possession, actual or constructive, of the property in question : *Morris on Replevin*, 3rd ed., p. 126 ; *Richardson v. Reed*, 4 Gray (Mass.) 441 ; *Hull v. White*, 106 Mass. 599 ; *Mitchell v. Roberts*, 50 N. H. 486 ; *Johnson v. Garlick*, 25 Wis. 705 ; *Folger v. Minton*, 10 U. C. R. at p. 425. Hence this action fails against the constables, for there was no detention by them : they had neither actual nor constructive possession at the time of action brought. The constables had no sort of control over the sheep after they were in the public pound : R. S. O. ch. 195 ; *Hammond*, N. P. p. 337. The basis of the legal idea of possession is control ; but beasts impounded are quite out of the control of the person impounding : *Sweet's Law Dict.* " Possession." Again, in replevin, now as always, it is necessary to show an unjust detention : *Gilbert on Replevin*, p. 82 ; *Hammond's N. P.* p. 335. Hence this action cannot lie against the pound-keeper : so far from his detention being unjust he is bound by statute to detain : R. S. O. ch. 195 ; *Selw. N. P.* 13th ed. p. 608 ; *Badkin v. Powell*, Cowp. 476. But besides this the pound-keeper's custody is the custody of the law, and therefore replevin will not lie : *Wardell v. Chisholm*, 9 C. P. 125 ; *Cotsworth v. Bettison*, 1 Salk. 247 ; *Gilbert on Replevin*, p. 40 ; *Folger v. Hinckley*, 5 Cush. (Mass.) 263 ; *Pilkington v. Hastings*, 2 Cro. Eliz. 813. Distinction must be drawn between a public pound and a private pound : *Stephen's N. P.* p. 1358 ; *Harrison's Mun. Man.* 4th ed. p. 402, note (g). Then, all the defendants were

officials acting *bond fide* in discharge of what they thought their duty: they all come within R. S. O. ch. 73: *Macdougall v. Peterson*, 40 U. C. R. 95. True, notice of action may not be necessary in replevin; but none of the cases pointing in that direction were decided since sec. 20 of R. S. O. ch. 73. Such a section did not exist in 16 Vic. ch. 180, under which *Manson v. Gurnett*, 2 P. R. 389, was decided. The necessity of alleging and proving malice in actions against officials is as applicable to actions of replevin as to other actions. On the merits, the sheep here were running at large, inasmuch as they were not being properly herded. The fact of their being on private property, seeing that it was unfenced, makes no difference: *Goener v. Woll*, 26 Minn. 154.

C. Moss, Q.C., for the plaintiff. Under the present Replevin Act the action will lie for the taking alone, apart from the detention. To say that these sheep were running at large is impossible. They were on private property at the time they were taken. None of the defendants can justify under the law unless they can make out that the sheep were running at large. Under the Act the pound-keeper is liable, and it is no defence that the sheep were in the custody of the law. But even at common law replevin lay in every case, except in case of a Superior Court writ. He cited *Gilbert* on Replevin, 138; *Jameson v. Kerr*, 6 P. R. 3; *Gilchrist v. Conger*, 11 U. C. R. 197; *Short v. Ruttan*, 12 U. C. R. 79; *Arnold v. Higgins*, 11 U. C. R. 191; *George v. Chambers*, 11 M. & W. 160; *Allen v. Sharp*, 2 Ex. 352; *Miller v. Leather*, 1 E. & B. 619; *Crowe v. Steeper*, 46 U. C. R. 87; *Deal v. Potter*, 26 U. C. R. 578; *Lewis v. Teale*, 32 U. C. R. 108. As to the other defendants being officials, it is impossible to bring them within the Act, and so they are not entitled to notice.

June 30, 1885. WILSON, C. J.—I agree the sheep were not, within the terms of the by-law, *running at large*. They were upon private, unenclosed property, with the consent of the owner to graze there, and a boy was in

charge of them while grazing and at the time they were taken up.

As to the pound-keeper it is said the action of replevin will not lie : *Badkin v. Powell*, Cowp. 476; *Wardell v. Chisholm*, 9 C. P. 125. See also upon the like point *McKellar v. McFarland*, 1 C. P. 451; *Brandling v. Kent*, 1 T. R. 60.

The other defendants were not entitled to a notice of action unless some facts existed which might give rise to an honest belief that the sheep were at large, and unless the defendants honestly believed that such a state of things existed which, if they had in fact existed, would have justified them in taking up and impounding the sheep : *Chamberlain v. King*, L. R. 6 C. P. 474.

The questions as to the existence of such a state of things which would give rise to an honest belief that the defendants had the right to take the sheep, and as to the fact of their honest belief upon such facts if they were found to exist, were not mentioned or discussed at the trial, but the evidence shews plainly that the two defendants who took the sheep knew the sheep were on private property ; and they took them because they were on unfenced land, a common within the village of Arthur, and no enquiry was made who the owner of the land was, and it appeared the plaintiff had the leave of the owner to graze his sheep there ; so that the sheep were as lawfully there as if the sheep had belonged to the actual owner ; and they were also in charge of a boy. So that it appears there did not exist a state of facts which should have given rise to an honest belief that the defendants had the right to take the sheep : the mere fact that the land was unfenced was not sufficient for that purpose ; although I think the defendant did honestly believe they were justified in taking the sheep ; but that alone without the proper foundation for that belief will not answer.

I think, therefore, the finding against the pound-keeper must be set aside, and the judgment be entered for him, and that the finding against the other defendants must stand. The pound-keeper will have the costs of the action, and of this application, and this motion as regards the other defendants will be dismissed, with costs.

O'CONNOR, J.—It appears to me there is no reason to doubt that replevin lies, under our statutes and decisions, in a case of this kind, except as against the pound-keeper : *Folger v. Minton*, 10 U. C. R. 423 ; *Short v. Ruttan*, 12 U. C. R. 79 ; *Arnold v. Higgins*, 11 U. C. R. 191 ; *Deal v. Potter*, 26 U. C. R. 578 ; *Miller v. Miller*, 17 C. P. 227.

The defendant Hammill (the pound-keeper) was allowed at the trial, and afterwards by this Divisional Court, to amend the statement of defence as regards himself, by adding a plea of *non cevit*, or any other statement that would suit his position in the case under the evidence ; and that was to be considered as done, with the plea of *non cevit* on his behalf added to the statement of defence filed, and having reference to the evidence I think replevin does not lie against the pound-keeper, the defendant Thomas Hammill. He did nothing, as the evidence shews, beyond his duty : *Wardell v. Chisholm*, 9 C. P. 125.

The other defendants, Henry and Munson, are liable in an action of replevin ; and they are not entitled to notice of action under the Vexatious Actions Act, R. S. O. ch. 73, because, although they were constables, and therefore Public Officers, it was no part of their duty as such officers to distrain and impound the sheep, even if they were "running at large" contrary to the by-law. The by-law made it lawful for the pound-keeper to impound any animal he might find running at large, and for any other person to take and deliver to the pound-keeper, for the purpose of being by him impounded, any animal which might be found running at large contrary to the by-law.

The defendants Henry and Munson are merely "*other*" persons who took and delivered the sheep to the pound-keeper ; and they are in no other position, nor have they any rights, privileges, or immunities, other than such as belong or pertain to any other persons who might have done the same thing. If the sheep were running at large contrary to the by-law the defendants last named are justified ; if the sheep were not so running at large they are trespassers, and liable in replevin as well as in trespass.

It was argued that these two defendants were not liable in replevin because they neither had nor controlled possession of the sheep, and that it was absurd to speak of replevying the sheep from such persons ; but that question seems to me to have been settled, for this province at least, by Draper, C. J., in *Wardell v. Chisholm*, 9 C. P. 125. At page 129 he says : " After the goods are left in his (the pound-keeper's) hands, if they are taken away by pound breach, the injury is not to him but to the distrainers, who may sue for it, and in whose possession at the common law, I take it, the things distrained are held to be while impounded." It is also decided that the value of any part of the goods which have not been replevied may be recovered together with damages in the action : *Deal v. Potter*, above cited, but especially at pages 586 and 587 ; *Rolston v. Lawson*, 17 U. C. R. 494 ; *Lewis v. Teal et al.*, 32 U. C. R. 108.

Thus, I think, stands the law. Now, as to the facts.

The evidence for both plaintiff and defendants shews that the sheep were on a piece of unenclosed land called the common, containing about thirty acres, owned by one Anderson ; and the plaintiff's evidence proves that he had leave from Anderson to send his sheep to graze on that piece of land for a small consideration or gratuity ; but at his own risk as regards a contravention of the by-law in question. The plaintiff told Anderson, on obtaining his leave, that a person would be in charge of the sheep on leaving home and would herd them on the common. He attended and herded the sheep himself eight days, and on the ninth, having occasion to go elsewhere himself, he left his son, a youth of fifteen years, in charge. A neighbour saw the boy herding the sheep there about one o'clock. About four o'clock the defendants Henry and Munson (Munson at the request of Henry) arrived, and were in the act of driving the sheep, or a large portion of them, on the common towards the highway, when, as they say, the boy appeared at a distance, but on the common, with a few of the sheep, and called out to them that the sheep were his.

The sheep were driven away and given over to a man employed by the defendant Hammill to attend to the pound, and they were by him impounded. The plaintiff demanded the sheep on the same evening, but was refused them until he paid pound charges. Another neighbour saw the boy herding the sheep on the common, and saw the constables arrive and drive them away off the common to and along the highway. The boy says he was in charge of the sheep continuously on the common, and that when the constables arrived he was gathering the sheep together to drive them home ; that he had got seventy of them together, and had gone a short distance to another part of the common, where the other twelve were, and was driving them towards the seventy when he was interfered with by the constables ; that he made an effort to drive the sheep from the constables home, but they overcame his efforts, and drove the sheep away towards the pound.

The defendant Henry says the sheep were on the common and about 200 yards from the highway.

The land was a partially cleared piece interspersed with old stumps and logs and standing trees.

Under these circumstances I conclude, without the slightest doubt, that the plaintiff had a right to put and keep his sheep on the common, that the sheep were rightfully there. Being in charge of a person capable of taking care of them, as a boy of fifteen years of age would be, they were not running at large, or as it is otherwise expressed, they were not " turned loose."

Sherborn v. Wells, 3 B. & S. 784 ; *Morris v. Jeffries*, 1 Q. B. D. 261.

The expression "running at large," applied to cattle or sheep, is a popular one, simple and well understood, and presents no difficulty.

Upon the whole case I am of opinion that the verdict should be set aside as against the defendant Hammill, and judgment be entered for him for his costs of defence only, and that judgment should be entered for the plaintiff against the other defendants for the amount of the verdict

and his full costs of suit, and amount paid poundkeeper for pound fees.

ARMOUR, J., took no part in the judgment, being engaged at the Toronto Assizes.

After judgment had been delivered counsel for the plaintiff contended that the plaintiff should be indemnified by the defendants other than Hammill, in respect of Hammill's costs, and the matter was directed to stand over till after vacation.

On September 10th, 1885, Moss, Q. C., for the plaintiff, renewed this contention.

Lefroy, contra.

Per Cur.—The plaintiff is not entitled to be indemnified excepting as to pound-keeper's fees, the costs of the pound-keeper were caused by the plaintiff's own act in wrongfully joining the pound-keeper in the action.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

IVEY & Co., v. KNOX, MORGAN & Co., JNO. MCPHERSON & Co., AND H. J. TAYLOR.

Insolvency—Policy of insurance—Assignment of to creditors—Pressure—Preference—R. S. O. ch. 118 sec. 2.

The jury having found that T. was, to his own knowledge and that of the preferred creditors, unable to pay his debts in full, and that assignments to certain creditors of two policies of insurances and moneys secured thereby, after the larger portion of the property insured had been destroyed by fire, had been made under simulated pressure with the intent on the part of T. to give, and on the part of the preferred creditors to obtain a preference over the other creditors of T.
Held, that the assignments were null and void under R. S. O. ch. 118, sec. 2, as against the other creditors of T.

The statement of claim alleged that the plaintiffs were merchants in London, Ont., and the defendants Knox, Morgan & Co., and John Macpherson & Co., merchants in

Hamilton, and the defendant H. J. Taylor, a merchant in Bothwell: that Taylor was indebted to the plaintiffs in \$240,31, for goods sold and delivered by them to him, and in \$200 for goods sold and delivered by Green & Co., of London, to him; and in \$93.48 for goods sold and delivered by A. M. Smith & Co., of London, to him: that before action said Green & Co., and Smith & Co., assigned their said claims to the plaintiffs: that on 18th of March last the premises and goods of Taylor were destroyed by fire: that said property was insured for \$2,000, \$1,000 in the Waterloo Mutual Fire Insurance Co., and \$1,000 in the North British and Mercantile Insurance Co.: that at the time of the fire Taylor was insolvent and unable to pay his debts in full: that his co-defendants, being creditors of his, and with intent to procuring a preference over other creditors, combined and agreed with Taylor to assign said policies of insurance and the moneys coming thereunder to them, so as to give the said co-defendants an undue preference over the other creditors: that Taylor, with such intent, on 19th March last assigned to the said co-defendants said policies and the moneys thereunder which the said co-defendants pretended to hold for their own use, and not for the use of plaintiffs or the other creditors: that the said co-defendants, when they took said assignments, knew Taylor was insolvent, and that they took them in order to secure undue preference over other creditors: that the said assignments were therefore fraudulent and void, and that the plaintiffs sued as well for themselves as the other creditors, and they claimed to have the said assignments declared fraudulent, null and void against them and the other creditors: that the moneys should be paid into Court for their own benefit and that of the other creditors, &c.

The statement of defence by Knox, Morgan & Co. and Macpherson & Co. denied the allegations of the plaintiffs, and stated that at the commencement of action no portion of the plaintiffs' claim was overdue, and the plaintiffs had no status to impeach the transactions in the statement of claim mentioned: that the said assignments were not made on the part of the defendants or any of them with the intent

alleged; but, on the contrary, that when the said assignments were made to them Taylor was indebted to them respectively in \$1491 and \$819, a great portion of which was overdue, and that acting *bond fide* in their own interests they pressed Taylor to pay and secure them in the same, as the result of which Taylor involuntarily and without any fraudulent intent made the said assignments: that on 24th March last, Taylor assigned to one McRae all his estate for the benefit of creditors *pro rata*, by reason whereof the said plaintiffs had no status to attack the said assignments.

The defendant Taylor also denied the plaintiffs' allegations, and that in making the said assignments he intended to prefer his co-defendants; and further, that at the time of action brought no part of the plaintiffs' claim was due.

Issue.

The case was tried at the last Spring Assizes at London, before Cameron, C. J., and a jury.

The facts appeared to be that J. W. Taylor, one of the three defendants, had an insurance against fire for \$2,000, as in the statement of claim alleged, and on the 19th of March, 1885, he assigned the policy by two separate assignments to his co-defendants, the two company defendants, Knox, Morgan & Co., and McPherson & Co., after the fire had happened, the fire being on the 18th of March.

Taylor's liabilities were \$5,109.69, on the 2nd of March shortly before the fire, and his assets according to his books shewed a surplus over liabilities of \$970.15.

John D. Ivey, one of the plaintiffs, said Taylor owed his firm \$240 before the fire, and that there was a total loss by the fire excepting about \$300 saved. The witness complained of McPherson & Co., that they had got all that Taylor had. Taylor had only property to pay 40c. on the dollar. Part of plaintiffs' debt was due at the time McPherson & Co. took the assignment, \$24.85 of it. Their sales previous to this last one were at four months.

Charles Ivey, a brother of the last witness, took a verbal assignment of Green & Co.'s claim to the amount of \$200, and of A. M. Smith & Co.'s claim. Upon this last claim \$78-

was past due. He took both assignments for the purpose of this suit; got the Green & Co. claim to have a case within the High Court of Judicature.

George Hays, a book-keeper of Green & Co., said no part of their claim of \$815 against Taylor was due at the commencement of this action.

Ernest Smith, a member of A. M. Smith & Co., said Taylor, on 19th March, owed the firm \$93.48. Taylor said he commenced business at Bothwell on 23rd August, 1884 and his liabilities in March, 1885, were about \$4,500: that he owed Knox & Co., \$1484, and Macpherson & Co., between \$700 and \$800: that he had \$1,000 insurance in the Waterloo Mutual, and \$1,000 in the North British and Mercantile: that about \$700 or \$800 fell due in March, and he could not meet it: that Knox came up and examined his affairs, and he told him to renew: that he did not give renewals for Knox & Co's. claim, nor for Macpherson & Co's. claim: that he left their claims overdue, but renewed as to the other creditors: that he was in Hamilton on the 18th of March, and while there he got a telegram from Bothwell that the store had been burned: that the telegram was to the care of Knox & Co. and he got it while in Knox & Co's. warehouse: that he told Knox at once of it: that Knox saw the telegram: that he had nothing then to pay upon that total loss, but the two policies for \$2,000, and \$200 or \$300 of book debts: that he supposed he was bankrupt at the time: that he made an assignment of the North British policy to Knox & Co. to secure their debt as far as it went: that \$200 about of that debt was then overdue, and he assigned the other policy to secure Knox & Co. and Macpherson & Co.: that there was more of Macpherson & Co's. claim overdue then than \$400: that the day after the fire he gave a chattel mortgage for \$161 on the stock saved, which the Insurance Company valued at \$500, and on the 28th of March he made an assignment for the general benefit of his creditors: that there were then left the book debts, and the balance then would be above the chattel mortgage debt of \$161. On cross-examination he said: "I assigned the policies in

consequence of pressure they brought to bear upon me in Hamilton. I refused to assign when they first asked me. The conversation with Knox lasted about three quarters of an hour before I consented to sign over the policies. \$600 of Knox & Co.'s claim was for money advanced. Green & Co. got that \$600. Macpherson & Co. got the assignment of policy from me in the same way Knox & Co. did, by talking at me. They said the claim was overdue and they had garnished my policies. I frequently refused to give the policy. I got tired out, I was worried into it. I refused to assign the book debts to them. The cash that had been advanced by Knox & Co. had some weight in my mind in assigning the policy, and that was one of the reasons why I did it. I thought his claim was more entitled to my consideration than the claims of the others. The load of misfortune upon me perhaps tried me. They tired me to a certain extent by importunity. Mr. Richardson, for Macpherson & Co., said their claim was overdue, and they could garnish the policies, and I ought to secure their claim in some way. All I had left was the policies and book debts, and they tried to get the book debts too, and my liabilities were about \$5,000."

At the close of the plaintiffs' case it was contended by the defendants counsel :

1. There was no debt payable at the time of bringing the action by Taylor to the plaintiffs.
2. That the claims of Green & Co., and of A. M. Smith & Co. were still theirs, as they had not been assigned by writing, or any consideration given for them by the plaintiffs.
3. That the assignment of the policies was no prejudice to the general creditors, because they could not be taken in execution, and were not exigible at the instance of creditors.

For the defence *Taylor* was recalled.

In cross-examination he said: "I intended these two companies should be paid out of the policies in preference to the others."

John Knox, senior member of the firm, said : "On the 18th March, at Hamilton, I telegraphed to Taylor, at Bothwell to come to Hamilton. He came on the 19th. While he was with me the telegrams came of the fire. I pressed him for security. I wanted \$1500 of the insurance money : he would only give me \$1000. I said to Taylor his fire was a bad loss to me. I asked him to give me security. I urged him I was entitled to be paid the advance of \$600 in cash any way in preference to the other creditors. I wanted 100c. on the \$, no matter what the others got. Mr. Robertson, for Macpherson & Co., pressed for the payment of their claims too."

Arthur W. Robertson, book-keeper of Macpherson & Co., said : "\$688 of their debt was past due on the 19th of March, and \$131 maturing. I saw Taylor at Mr. Knox's office that day. I said he must secure his debt : he refused. I said we would sue and attach his policy, and he gave the assignment. The sole object was to get our debts paid. Knox & Co., and Macpherson & Co., had agreed before that to work together to get our debts paid in preference to the other creditors."

The questions left to the jury were :

1. Was there a debt due and payable from the defendant H. J. Taylor to the plaintiffs John D. Ivey & Co., at the time this action was commenced on the 25th March 1885 ? Jury's answer, "Yes."

2. Was there on the said 25th March, 1885, a debt due and payable from the defendant H. J. Taylor to John Green & Co., or A. M. Smith & Co.? Jury's answer, "Yes."

3. If there was a debt due and payable by the said Taylor to the said Green & Co. or A. M. Smith & Co., was such debt, or any part of it, in truth or fact assigned to the plaintiffs John D. Ivey & Co.? Jury's answer, "Yes."

4. Was the policy in the Waterloo Mutual Fire Insurance Co. issued to H. J. Taylor, assigned by the said Taylor to the defendants John Macpherson & Co. with intent to give to the said John Macpherson & Co. a preference over the

other creditors of the said Taylor, or any of them ? Jury's answer, " Yes."

5. Were the policies in the North British and Mercantile Insurance Co., issued to the said H. J. Taylor, assigned by the said Taylor to the defendants Knox, Morgan & Co. with intent to give to the said Knox, Morgan & Co. a preference over the other creditors of the said Taylor or any of them ? Jury's answer, " Yes."

6. Was the said Taylor at the time he made the said assignment of the said policies in insolvent circumstances, or unable to pay his debts in full ? Jury's answer, " Yes."

7. Did the defendants Knox, Morgan & Co., at the time they took the said assignment of said policies assigned to them, know that the said Taylor was insolvent or unable to pay his debts in full. Jury's answer, " Yes."

8. Did the defendants John Macpherson & Co., at the time they took the assignment of the policy assigned to them, know that the said Taylor was insolvent or unable to pay his debts in full ? Jury's answer, " Yes."

9. Did the defendants Knox, Morgan & Co. and John Macpherson & Co., or either of them, or each of them, when they obtained the assignment of the policies, know of the intent of the defendant Taylor to give them a preference over the other creditors ? Jury's answer, " Yes, both did."

10. In taking the said assignments of the said policies did the said defendants Knox, Morgan & Co., and John Macpherson & Co., or either of them, and which of them, intend to obtain a preference over the other creditors of the said Taylor ? Jury's answer, " They did."

11. Did the defendant Taylor make the assignment of the policies under pressure brought to bear upon him honestly, and not for the purpose of giving the appearance of pressure to make the assignment valid when such pressure was not in fact real, but only used to prevent the assignments appearing to have been made to give a preference to the defendants Knox, Morgan & Co., and John Macpherson & Co. ? Jury's answer, " No. We find that

the pressure was not real, but for the purpose of giving the defendants Knox, Morgan & Co. and John Macpherson & Co. the preference over other creditors."

On these findings judgment was entered for the plaintiffs.

June 4, 1884, *Osler*, Q.C., obtained an order *nisi* to set aside the verdict and judgment and for a new trial, or to enter judgment for the defendant Taylor, on the ground that the findings were against evidence and weight of evidence: that there was no evidence of fraudulent intent, the uncontradicted evidence being that the transaction was the result of a *bond fide* pressure on the part of the defendants other than Taylor: that the learned Judge should have nonsuited the plaintiffs.

McCarthy, Q.C., for defendants. Even if there can be an equitable assignment of part of a promissory note by parol the assignment must be before the Court, which is not the case here. Policies are not exigible under execution, nor can an assignment thereof be set aside, being only an assignment of the debt. There cannot be any equitable garnishment, being only an unascertained claim for damages: *St. Michael's College v. Merrick*, 1 A. R. 532; *Bank of Toronto v. Burton*, 4 P. R. 56; *Gwynne v. Rees*, 2 P. R. 290. As to the intent with which the assignments were made, there is no evidence of its being fraudulent, the insolvency of the assignor is not sufficient: there must be, if exigible property, an intent to defeat creditors, or prefer; and there must be a common intent: *Brown v. Sweet*, 7 A. R. 731; *Allan v. McTavish*, 8 A. R. 440; *Hepburn v. Parke*, 6 O. R. 472; *Whitney v. Toby*, 6 O. R. 54. As to pressure see *Davidson v. Ross*, 24 Gr. 83; *Ex parte Helder*, *In re Lewis*, 24 Chy. D. 33. A request by a creditor for payment would be enough: *Slater v. Oliver*, 7 O. R. 158, 162. This is the latest decision, which reviews and explains the cases in England and here. *Bank of Toronto v. McDonagh*, 15 C. P. 475, lays down the law correctly. Judgment should have been entered for defendants at the

end of the plaintiffs' case. The case was not fairly put to the jury. For cases on pressure see *Brayley v. Ellis*, 9 A. R. 565; *McRae v. White*, 9 S. C. 22; *Stuart v. Tremaine*, 3 O. R. 190. On the right to sue *Reese River Silver Mining Co. v. Atwell*, L. R. 7 Eq. 347; *Longeway v. Mitchell*, 17 Gr. 190, may be referred to. The assignee here cannot bring this action. He is not like an assignee in insolvency.

Meredith, Q. C., contra. *Bump* on Fraudulent Conveyances, 503, shews that it matters not whether the debt is due or not: *Howe v. Ward*, 4 Maine 195, and cases cited; *Scane v. Duckett*, 3 O. R. 370; *Campbell v. Campbell*, 29 Gr. 252, which qualifies *Hepburn v. Pator*, 26 Gr. 597. *Walsh v. Lonsdale*, 21 Chy. Div. 9, shews this action is maintainable. Leave was asked to add plaintiffs' assignors, if necessary, and this can now be done. *Bank of Montreal v. McTavish*, 13 Gr. 397, shews this action is maintainable: *St. Michael's College v. Merrick* is not now applicable. See *Maclennan's* O. J. A., 2nd ed., 476, 453, 451. As to pressure see *Long v. Hancock*, 9 O. R. 154, affirmed on appeal, and now before the Supreme Court; *Ex parte Hall*, 19 Chy. Div. 580; *Re Boon*, 41 L. T. N. S. 42; *McNaughton v. Webster*, 6 U. C. L. J. 17. *Slater v. Oliver*, 7 O. R. 163, recognizes these English cases. *McRae v. White*, 9 S. C. 22 is distinguishable, as there the debtor was intending to continue business. The policy of the Legislature is to prevent preference. The necessary result here was to give a preference, and so the action is void. There was no advance made; no extension of time; no carrying on of business. The debtor was only able to pay about 40 cents on the dollar. The assignee by joining a creditor can impeach the assignment: *Parkes v. St. George*, 2 O. R. 342; 10 A. R. 496.

McCarthy, Q.C., in reply. *Slater v. Oliver* has settled the meaning of the Statute. The point is *was there pressure?* *Long v. Hancock* was decided on the facts. *Campbell v. Campbell*, 29 Gr. 202, only decides that the Statute of Elizabeth applies to such a case where the cause of action already exists.

June 30, 1885. WILSON, C. J.—It was contended there was no present debt payable at the time of the action brought which the plaintiffs could claim in their own right. The jury found there was, and also for the plaintiff in respect of the claims of Green & Co. and of Smith & Co., which the plaintiffs claimed as assignees. The amounts altogether so overdue were not very large. They had, however, large claims then maturing. Their claims are sufficient to support the action.

It was argued also that the plaintiffs were not assignees of the claims of Green & Co. and Smith & Co., because they were only so by parol and had given no consideration.

I think these parties should, if necessary, be joined as plaintiffs in the action. The jury found the assignments of the two policies were made by Taylor with the intent to give to the assignees of them a preference over the other creditors of Taylor.

I can only say there was evidence to support the finding.

The assignor was unquestionably in insolvent circumstances, as well as unable to pay his debts in full, and he made these assignments upon his own evidence, which the jury might very reasonably and properly understand as showing that he made them with intent to give to these two companies a preference over his other creditors.

When any such arrangement is made for the personal benefit of one or more out of many creditors, and there is any evidence which will properly support the finding of a jury that the arrangement was made by way of preference to the prejudice of the general creditors, we should not readily reverse that finding.

The policy of the law was and is to favour the equal distribution of the debtor's estate among his creditors, excepting in some special case which can be plainly proved not to be against that policy, and I do not see that the assignments to these two companies are plainly excepted from that general policy.

It was objected that the insurance money after it had become payable was not liable to be taken for the payment of debts by execution or otherwise. The case of the *Bank of Montreal v. McTavish*, 13 Gr. 395, shews that objection cannot be sustained, and R. S. O. ch. 66, sec. 28, shews that "securities for money" may be taken in execution, and the policies after the loss by fire are certainly securities for money, upon which the amount to be paid can readily be ascertained and reduced to a certainty.

The two companies certainly knew that Taylor was insolvent at the time he assigned the policies.

Whether the companies knew that Taylor intended to give them a preference, as the jury found he did, may not be quite clear; but there is evidence, as I have said, to support it. But I think it is still less clear from the evidence that the companies knew the intent of Taylor was to give them a preference. They seem to have been under the impression that he would not give it, and their defence is that as far as argument and persistence, and even threats of an action and attaching the policies constitute pressure, they claimed the assignments by these means, and they did not and could not know under these circumstances that Taylor was giving them the assignments by way of preference.

The jury were of opinion that the means used by the companies to obtain the assignments were not pressure honestly applied for that purpose, but that the pressure which was relied upon as doing away with a preference by Taylor, was a mere pretence to cover what was in reality a preference contrary to the statute.

With regard to pressure generally, the threat of suing and attaching the policies could have had no effect on the mind of Taylor, who was utterly insolvent and unable to pay one-half of the claims which were against him; and mere and continued solicitation is not much of a pressure to a man so circumstanced either. What operation could it all have had, or should it have had upon him, it is very difficult to understand: *Long v. Hancock*, 7 O. R. 154,

referring to *Ex parte Hall*, 19 Ch. D. 580, is an authority on that point. In *Ex parte Griffith*, 23 Ch. D. at p. 72, the Master of the Rolls said the debtor in that case "was influenced not by the demand of the creditor for a preference, but by his desire to accede to the demand and to give him a preference;" and Bowen, L. J., said the enquiry should simply be "whether the transaction was entered into with a view to give the one creditor a preference over the other."

The earlier cases no doubt are rather lax with respect to what will constitute *pressure* to prevent a payment or dealing being held to amount to a "voluntary preference." The words of the Act, it should be kept in mind, also are not a *voluntary* preference, but a preference merely. The question was one solely for the jury to determine, and I am not satisfied they have done wrong; but I am satisfied there was evidence before them upon which they might properly find for the plaintiffs.

The facts shortly stated are: The debtor owed about \$5000. He had a policy upon his goods to the extent of \$2000. He had book debts to the amount of about \$250. His goods were destroyed excepting a portion which sold for about \$300.

All he had left after the fire was the policy for	\$2000
The book debts for	250
And the salvage.....	300
<hr/>	
or in all	\$2550

to pay liabilities to nearly twice that amount.

These two companies wanted the debtor to give him the policy and the book debts, leaving the salvage of \$300 for the other creditors, whose claims were \$2500. The book debts, however, were not given to the companies, and perhaps they were no losers by not getting them. It may be said the companies got substantially all the estate, and payment nearly in full, while the other creditors got about 10c. or 12c. on the \$. Now such a transaction should be

closely watched, for it is not quite a fair one read in connection with the true intent of the R. S. O., ch. 118; the 43 Vic. ch. 10, (O.), abolishing priority among execution creditors, and especially the 48 Vic. ch. 26, (O.), not yet called into operation.

I do not think the R. S. O. ch. 118, prohibiting assignments, &c., made by an insolvent debtor with intent to give a preference to any of his creditors, can by any means be read so as to exclude the consideration of the *intent* with which it is made, as that is an essential part of the enactment, and in that way the question of *pressure* is brought in; for if the *intent* be shewn to have been to avoid a threatened criminal prosecution, or to prevent the creditor from doing any other act or thing which would be damaging to the business prospects, or the good name or financial standing or reputation of the debtor, or to save the character of his relative or friend, or the like, that would plainly shew the *intent* was not to give a preference, and it is in that way the nature of the act of assignment, &c., whether it was *voluntary*, or by way of *fraudulent* preference, has to be considered, and so *pressure* upon the debtor presents itself; for if there be pressure then it is said the *intent* was not to give a preference; that is, the preference was not the inducement to or the purpose for which the assignment, &c., was made, but is the consequence of making the assignment.

And the statute does not invalidate the assignment because it results in a preference, but only when it is made expressly, that is, with the intent to give the preference. The motive alone has to be considered in the making of it; for if the motive cannot be impeached the act is valid, as the consequences of that act are not to be questioned. I cannot say there is any substantial difference between a "fraudulent preference" or "voluntary preference," and the doing of an act "with intent to give a preference to defraud" creditors. The first and third terms are, I may say, identical. The second and third mean, when properly considered, the same thing; for that which is *voluntary* in the one case

must be the same as the *intent* in the other case. If the will be controlled the act is not voluntary; so neither can it be the *intent* of the party.

I do not think it of any consequence, I may add, whether the companies had the intent to gain a preference over his other creditors when they took the assignments for a past debt: the statute avoids the assignments if the debtor make them with that intent. A sale or mortgage of goods cannot be avoided unless the purchaser can be charged with a fraudulent intent against creditors: *Harwood v. Bartlett*, 6 B. N. C. 61; *Pennell v. Reynolds*, 11 C. B. N. S. at p. 722; *In re Coleman*, L. R. 1 Ch. 128. As a fact, however, I should say beyond all question the whole object of these two companies was to obtain a preference, and they made use of such means as they thought, taking their own account of the transaction, would secure them that preference.

I am of opinion the motion must be dismissed, with costs.

O'CONNOR, J.—The 4th paragraph of the plaintiff's statement of claim read with reference to the 3rd paragraph, alleges an assignment by John Green & Co., and A. M. Smith & Co. of their respective claims to the plaintiffs; that is, \$200 assigned by John Green & Co., and \$93.48 by A. M. Smith & Co. In my opinion the evidence does not establish either a legal or an equitable assignment in either of these cases.

Then, as regards the debt of \$24.85 to the plaintiffs, the jury expressly found that it was due before the assignment complained of and therefore also before action brought, and I think the evidence was sufficient to sustain the finding. The plaintiffs were, then, creditors of the defendant Taylor in respect of that debt of \$24.85, which was overdue; and the plaintiffs had therefore a *locus standi* in Court when they brought their suit. Recent decisions show, that the old rule requiring the plaintiff to obtain a judgment for his claim before attacking a fraudulent or preferential assignment has become obsolete.

The statement of claim asks that the several assignments of the policies of insurance made to Knox, Morgan & Co. and to John McPherson & Co. be declared fraudulent and void as against the plaintiffs and others, the creditors of the defendant Taylor ; and that the money secured by the policies may be paid into Court to the credit of this cause for the benefit of the plaintiffs and the said other the creditors, etc.

The next question, and in fact the only one is, are the assignments referred to fraudulent and void ? Under the statute 13 Eliz. ch. 4, they clearly would not be fraudulent and void merely because they gave a preference to one or more creditors over other creditors, and were intended to give such preference: *Bump* on Fraudulent Conveyances, pp. 218, 219, and cases there cited.

The Statute of Elizabeth merely avoids instruments made with intent to defraud, hinder or delay creditors ; but the payment of a debt to one creditor is no fraud upon other creditors, no legal injury to them. But in England the bankruptcy laws interposed an obstacle by adding another condition as did also the insolvency laws in this Province, while they were in force.

But our Statute 22 Vic. ch. 96, afterwards ch. 26, C. S. U. C., and now ch. 118 R. S. O., sec. 2, makes null and void as against creditors "any gift, conveyance, assignment or transfer of any of his goods, chattels or effects," or delivery or making over, or causing to be delivered or made over "any bills, bonds, notes or other securities or property," by "any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, with *intent* to give one or more of the creditors of such person *a preference* over his other creditors."

That the policies in question in this case were assigned with the intent and for the purpose of giving the several assignees a preference over the other creditors of the defendant Taylor was acknowledged by the defendant Taylor on his own part ; by Knox's evidence, and by the evidence

of Robertson. It is equally clear that the assignments were obtained by the defendants Knox, Morgan & Co., and John McPherson & Co., to secure the several debts due them in preference to the other creditors of the defendant Taylor. It is also beyond doubt that the defendant Taylor knew he was in insolvent circumstances, and unable to pay his debts in full : that his debts amounted to about \$5000, while his indebtedness to the other defendants in this suit amounted to little if anything more than two-fifths of the whole indebtedness : that besides the policies there were nominally \$300 of book debts, and \$500 worth of goods saved from the fire, including goods damaged, all of which were worth about \$500 in cash. These facts were found by the jury, and were known to the other defendants as well as to the defendant Taylor, which knowledge was as a fact also found by the jury.

Under these circumstances the assignments of the policies cannot be otherwise than null and void as against the creditors of the defendant Taylor.

It was urged for the defence that the defendant Taylor made the assignment at the urgent request of and under strong pressure exercised by the other defendants on him ; but the jury, in answer to a distinct question, found that that the assignments were made, not under pressure, and that the pressure affected to be used was not real ; in short, was simulated for the purpose of justifying a preference.

This of course disposed of that part of the case of the defendants adversely to them.

In my view of the case, however, that question was unnecessary, for I think the case was fully disposed of without that. I think, therefore, the order *nisi* should be dismissed, with costs.

ARMOUR, J., took no part in the judgment, being engaged at the Toronto Assizes.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. RICHARDSON.

Police magistrate—Information—Conviction—Reserving case for Superior Court—Removal by certiorari of proceedings—New trial—Constitutional law.

Held, that a Police Magistrate cannot reserve a case for the opinion of a Superior Court under Consolidated Statutes of U. C. ch. 112, as he is not within the terms of that Act.

Held, also, that a defendant is not entitled to remove proceedings by *certiorari* to a Superior Court from a Police Magistrate or a Justice of the Peace after conviction, or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the Court and no motion made to quash it. But, *Held*, that even had the conviction in this case been moved to be quashed, and an order *nisi* applied for upon the magistrate and prosecutor for a mandamus to the former to hear further evidence, which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the Court would not interfere.

The Court declined to hear discussed the question whether the Police Magistrate in this case, if appointed only by the Ontario Government, was legally or validly appointed, as his appointment should have been by the Dominion, the Patent by the Ontario Government only being produced, and it not appearing that no commission by the Dominion had issued to him, nor that any search or enquiry had been made at the proper office as to the fact, the only other evidence as to the appointment, besides the mere production of the Ontario patent, being the defendant's affidavit stating that the magistrate had no authority or appointment from the Crown or the Governor-General of the Dominion, and that he knew this "of common and notorious report."

Held, also, that the information in this case was not objectionable for not setting out the false pretences of which the defendant was convicted, as it was in the form in which an indictment might have been framed; and moreover, the objection was met by the 32-33 Vic. ch. 32, sec. 11, (D.) and by 32-33 Vic. ch. 31, sec. 67, (D.)

A *certiorari* was issued from this Court on the 19th of May, 1885, directed to James B. Flint, the Police Magistrate for the city of Belleville, and a Justice of the Peace in and for the county of Hastings, to return to this Court a conviction and proceedings had before the said Police Magistrate against the defendant on the information and complaint of William Ransom and N. M. O'Lean on a charge of obtaining money under false pretences.

May 27, 1885. *Dickson*, Q.C., for the defendant, moved, upon reading the *certiorari*, and the affidavits of the defendant and Robert F. Forsyth, to set aside the conviction or judgment herein, and for a new trial or *venire de novo*, upon the grounds: 1. That the judgment or conviction was not supported by the evidence had before the Police Magistrate, and was against the law and evidence and weight of evidence. 2. The discovery of new and important evidence since the trial. 3. The rejection of the evidence by the Police Magistrate of Robert F. Forsyth, William Holland, and James Ainhart, tendered on behalf of the defendant at the trial. 4. That the Police Magistrate was not one of the magistrates of the Peace, and had no jurisdiction or power to convict in the premises. 5. That the Police Magistrate, after hearing the evidence, improperly consulted with one B. M. Britton in reference to the judgment he should pronounce in the matter of the said information and complaint.

The Police Magistrate also reserved a case for the consideration of this Court upon the same information and complaint.

Irving, Q. C., for the Crown, shewed cause. There is no power in the Police Magistrate to reserve a case for the Superior Court. The 38 Vic. ch. 47, sec. 7, (D), authorizes the Police Magistrate, if he cannot deal with the case summarily, to deal with it as if that Act had not been passed, and in such case the party may be afterwards tried summarily by his own consent at the County Judge's Criminal Court. The defendant elected to be tried before the Police Magistrate under the 38 Vic. ch. 47, and pleaded not guilty to the charge. The C. S. U. C. ch. 112, giving the power to reserve cases for the opinion of this Court does not apply to trials before Police Magistrates. The Police Magistrate's Court is not a Court of Record: *Regina v. Mason*, 22 C. P. 246. The defendant may rely upon 32-33 Vict. ch. 32, sec. 1, (D), which declares that the expression "a competent magistrate," shall mean and include a Police Magistrate and other named officials "invested at

the time of the passing of this Act with the powers vested in a Recorder by ch. 105 of the Consol. Stats. of Canada acting within the civil limits of his or its jurisdiction, and any functionary or tribunal vested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace." The reference to the powers of Recorders and Recorders' Courts is contained in the Consol. Stat. Can. ch. 105, sec. 30. That Act, excepting secs. 30, 31, 32, and 33, was repealed by the 32-33 Vict. ch. 36, (D), Sched. B. But ch. 32 of the last named year, sec. 34, repeals the whole of that ch. 105, so that the defendant may not be enabled to rely upon that provision for the purpose for which he may now use it. As to the objection to the information not stating the false pretences, it is sufficient, for our statutory forms do not require it. There are no such forms in the English Act, but under that Act the omission to state the false pretence has been held to be not objectionable after verdict: *Regina v. Goldsmith*, L. R. 2 C. C. 74. The next objection is, whether, a breach of warranty of a horse that it was sound, when it was unsound, and its unsoundness was known at the time, the warranty having been given with intent to defraud, and the purchaser having been thereby defrauded, is or may be treated as a false pretence. [He referred to some authorities on this point, but the authorities are more fully referred to by the learned Chief Justice in his judgment.] As to the questions arising under the *certiorari* it is said evidence was rejected by the Police Magistrate. That rejection was after the case had been closed and fully argued by the counsel for the defendant and for the Crown, and when it was understood no further evidence was to be given, and the case stood over a short time for judgment. When judgment was about being given the defendant's counsel desired a second enlargement to put in further evidence, he having already received an enlargement for that purpose, upon which first enlargement he put in further evidence; but the Police Magistrate declined to give such further time,

because the prosecutors had left Belleville and could not then attend at the Court ; and because the first enlargement was given on the condition that the additional evidence then put in should not be in contradiction to that which had been given by the prosecutors, and they were thus allowed to leave Belleville upon that assurance being given ; whereas, when that witness was examined his evidence directly conflicted with that of the prosecutors, but it was nevertheless received ; and because, further, the defendant's counsel then closed his case, having no further evidence to offer, and the whole case was argued by counsel ; and because the prosecutors could not then be present to give evidence if it were required. Upon this state of facts the Court will not now grant a new trial. The last objection was that the Police Magistrate had not been duly appointed. He had a patent of appointment from the Ontario Government, and that was produced, but it was not shown he was not appointed (if it be necessary it should have been so) by the Dominion Government.

Dickson, Q. C., supported the motion. If the omission to shew the non-appointment by the Dominion Government be an objection, the case must rest on the other objections. As to *certiorari* in such a case, that is to the Police Magistrate for the purpose of moving for a new trial. He referred to 2 Hales, P. C. 211 ; 2 Burn's Justice, "Certiorari," 616. Paragraph 13 of the defendant's affidavit shews the importance of the evidence which the witnesses who were rejected could have given, and were ready to give. The affidavit of Forsyth shews his evidence, which was rejected, is also very material. As to the false pretence he referred to *Regina v. Gemmel*, 26 U. C. R. 312. He also referred to *Regina v. Bennett*, 1 O. R. 445, in which the question of the appointment of a Police Magistrate by the Ontario Government was discussed, and decided by Cameron, J., to be a valid appointment. It is desired by the defendant to raise that question for further consideration.

June 30, 1885. WILSON. C. J.—During the argument we declined to hear discussed the constitutional question desired to be raised by the defendant that the Police Magistrate, if appointed only by the Ontario Government, was not legally or validly appointed, because his appointment should have been made by the Dominion Government, as it was contended; for, although a patent of appointment was produced from the Ontario Government, it did not appear there had been no commission issued to him from the Dominion Government, nor that search and enquiry had been made at the proper offices to ascertain whether a commission had been granted by the Dominion Government, and it was thus made to appear that no such commission had been granted. The only ground upon which the question was desired to be discussed was the mere production of the patent of the Ontario Government appointing Mr. Flint Police Magistrate, and the affidavit of the defendant, which after stating that Mr. Flint had a commission from the Lieutenant-Governor of Ontario, concludes in these words: "He has no authority or appointment from the Crown or from His Excellency the Governor-General of the Dominion of Canada to act as a Magistrate or Justice of the Peace: 'these facts I know of common and notorious report;' and we had no wish to hear an argument on so important a matter "upon common and notorious report" only.

The case establishing the validity of such an appointment, of *Regina v. Bennett*, 1 O. R. 445, we may say, without expressing any opinion upon its correctness or incorrectness, as we are not required to do so, we hope may be found to have been well decided.

Then as to the objection to the information for not setting out the false pretences.

.It is sufficient that it is in the form in which an indictment may be framed, and besides the 32-33 Vic., ch. 30, sec. 11, (D.) enacts that "no objection shall be taken or allowed to any information and complaint for any alleged defect therein in substance or in fact, or for any variance between it and the evidence adduced on the part

of the prosecution before the Justice or Justices who take the examination of the witnesses in that behalf." So also 32-33 Vic., ch. 31, sec. 67, (D.) declares that on appeal "no judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint, &c., * * for any alleged defect whatever in substance or in form * * unless it shall be proved before the Court hearing the appeal, that such objection was made before the Justice before whom the case was tried, and by whom the said conviction, judgment, or decision was given, nor unless it is proved that notwithstanding it was shewn to the justice that by such variance the person appearing or apprehended had been deceived or misled, such justice refused to adjourn the hearing of the case to some future day as provided by this Act."

The remaining question is: "Can the Police Magistrate reserve a case for the opinion of this Court under the C. S. U. C., ch 112?"

Section 1 of that Act enacts that "when a person has been convicted of treason, felony or misdemeanor before any Court of Oyer and Terminer, Jail Delivery, or Quarter Sessions, including Recorder's Courts, the Judge, Recorder, or Justice of the Peace before whom the case was tried may in his or their discretion reserve any question of law which arose on the trial for the consideration of the Justices of either of Her Majesty's Superior Courts of Law," &c.

The question arises under the 32-33 Vic. ch. 32, sec. 1, (D.) which enacts that "a competent magistrate" under that Act "should mean and include any *Recorder*, Judge of a County Court, being a Justice of the Peace, Commissioner of Police, Judge of the Sessions of the Peace, *Police Magistrate*, District Magistrate, or other functionary or tribunal invested at the time of the passing of this Act with the powers vested in a *Recorder* by chapter 105 of the Consol. Stats. of Canada."

It was said that chapter 105 was repealed by section 34 of the same Act, ch. 32, which declares what a "com-

petent magistrate" shall mean and include; but that would not prevent the Act, ch. 32, sec. 1, making reference to the Consol. Stat. Can., ch. 105, repealed upon the same day as the Act which refers to it was passed. But *at the time of the passing* of the 32-33 Vic. ch. 32, which was on the 22nd of June, 1869, the Recorders' Courts, which were Courts of Record, and which were last mentioned in the 29 and 30 Vic. ch. 51, in the sections of that Act, 368, 369, 373, 375 to 379, both inclusive, and 381, to 388, both inclusive, and 394 were abolished by the repeal of the above sections by the 32 Vic. ch. 6, sec. 10, (O.), which also repealed all letters patent which had been granted to Recorders, and the proceedings and matters then pending in these Courts were transferred to the several Courts of the General Sessions of the Peace of the respective counties in which the cities are respectively situated, and that Act was passed upon the 19th of December, 1868, more than six months before the Act 32-33 Vic. ch. 32, (D.), was passed and which referred to Recorders' Courts as then still subsisting under Consol. Stat. Can. ch. 105; so that all reference by the Act of 1869, ch. 32, sec. 1, to the *Recorder*, or to the powers thus invested in the *Recorder*, so far as Ontario is concerned, must be disregarded.

There was both a Police Court and a Recorder's Court in cities from the time of the passing of the first Municipal Act in 1849 until the Recorder's Court was abolished by the Act 1868, (O.)

The duties of the Police Magistrate were more particularly pointed out in the Act of 1849, and in the amendment of it by the Act of 1850. But for a short time before the Consolidation Act of 1859 was passed, and up to the present Act 46 Vic. ch. 18, sec. 433, (O.), the duty of the Police Magistrate, so far as Ontario legislation has provided, has been just what it now is, that duty being "the disposal of the business brought before him as a justice of the peace."

There are numerous statutes in which the powers of the Police Magistrate are referred to, and they are all with reference to their duties as *Justices of the Peace*.

By 32-33 Vic. ch. 31, sec. 65, (D.), as secondly amended by the 40 Vic. ch. 27, (D.), it is provided that "Unless it be otherwise provided in the special Act under which the conviction takes place or an order is made by a Justice or Justices of the Peace, or unless some other Court of Appeal having jurisdiction in the premises is provided by an Act of the Legislature of the Province, within which such conviction takes place or such order is made, any person who thinks himself aggrieved by any such conviction or order may appeal * * * *in the Province of Ontario to the Court of General or Quarter Sessions of the Peace.*"

That enactment qualifies 32 and 33 Vic. ch. 31, sec. 66, (D.), which speaks of the appeal being to "the Court of General or Quarter Sessions of the Peace or Court appealed to," and in sec. 69, which speaks of "the Court of General or Quarter Sessions of the Peace or other Court or Judge to whom an appeal is made."

These sections certainly exclude *an appeal* to this Court, for besides the General Sessions of the Peace no other Court of Appeal is provided.

Then by the 32-33 Vic. ch. 31, sec. 71, (D.), as amended by the 33 Vic. ch. 27. sec. 2, (D.), "No conviction or order affirmed, or affirmed and amended on appeal, shall be quashed for want of form, or be removed by *certiorari* into any of Her Majesty's Superior Courts of Record"; which shews a general appeal does not lie and cannot be made to this Court, although this Court has still the right to entertain motions, which may be called motions *by way of appeal*, to quash convictions, so long as that general jurisdiction is not expressly taken away.

The 38 Vic. ch. 45, sec. 1, (D.), enacts that "Any Judge, junior Judge, or deputy Judge, trying any person under the 32-33 Vic. ch. 35, (D.), in Ontario, may in his discretion reserve any question of law arising on such trial for the

consideration of the Justices of one of Her Majesty's Superior Courts of Common Law of the said Province in the same manner and to the same extent as may be done by the Court of General Sessions of the Peace under chapter 112 of the Consolidated Statutes for Upper Canada.

The 32-33 Vic. ch. 35, (D.) referred to, is the Act for the more speedy trial in certain cases of persons charged with felonies and misdemeanors, and the power under that Act cannot be exercised by Police Magistrates.

By the 38 Vic. ch. 47, (D.), "Any person charged in Ontario before a Police Magistrate, or before a Stipendiary Magistrate in any county, district, or provisional county in Ontario, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace * * may with his own consent be tried before such magistrates, &c." And by section 2 the proceedings upon and subsequent to such trial shall be as nearly as may be the same as upon a trial under the 32-33 Vic. ch. 32, (D.), which relates to "the prompt and summary administration of criminal justice in certain cases," and under which Police Magistrates may try such cases. By that Act there is no power to reserve a case, and nothing is said of an appeal. Under the 40 Vic. ch. 27, sec. 7, (D.), it is provided that "If the magistrate is of opinion from any circumstances appearing in the casⁿ that the charge cannot be properly disposed of before him, he may at any time before the person charged has made his defence decide not to adjudicate summarily thereon, and may thereupon deal with the same as if this Act had not been passed, and in such case such prisoner may be afterwards tried summarily by his own consent at the County Judges Criminal Court."

From these enactments and the practice which has prevailed up to the present time, we are of opinion that proceedings before a justice of the peace, or before a Police Magistrate who can act alone where two justices of the peace are required to act, but who nevertheless acts as a *justice of the peace* with more extended jurisdiction than

an ordinary justice of the peace, cannot reserve a case for the consideration of this Court, as he is not within the terms of C. S. U. C. ch. 112, nor of any Act which extends to him such a power.

There is power in England, by the 20 and 21 Vic. ch. 43, given to justices of the peace to state a case for the opinion of the Court, and some enactment of the kind might properly be introduced here.

The remaining question is, whether a defendant is entitled to move proceedings to this Court from the Police Magistrate or from a justice of the peace after a conviction, or I may say at any time, for the purpose of moving for a new trial, for the rejection of evidence, or because the conviction is against evidence.

The rule is well settled that if there is any reasonable evidence the Court will not quash the conviction : *Regina v. Howarth*, 33 U. C. R. 537, refers to many of them. *Regina v. Dickenson*, 7 E. & B. at p. 834.

The Court will not receive affidavits that the fact was done by the defendant who has obtained a *certiorari*, in assertion of a right, though if that were true, the magistrate would have no jurisdiction : *Regina v. Pullen*, 1 Salk. 368 ; *Rex v. Liston*, 5 T. R. 341.

We have not the conviction before us. If it were here properly, and we affirmed it, it would not be remitted, but execution upon it would issue from this Court : *Paley on Summary Convictions*, 5th ed. 439.

It appeared to me on looking over the case that this Court could not grant a new trial in any case of this kind; but it would be impossible to do so while the conviction stands, and it has not been moved to be quashed.

I find it laid down very plainly in *Tapping on Mandamus*, 110, that "Where a tribunal of competent jurisdiction has decided a case, the Court of B. R. cannot, by mandamus, command a re-hearing." And again at page 236: "The writ does not lie to command the Quarter Sessions to re-hear an appeal, although erroneously decided ; because, as the Queen's Bench is not a Court of Appeal from such Court,

so it has no jurisdiction to review the judgment thereof, except on a case sent up for their consideration; and therefore, where the Sessions, after having heard the witnesses on one side, refused to hear those on the other, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to the usual practice, the Court of B. R. refused to hear the appeal, on the ground that it had no power to command the re-hearing of an appeal which had once been heard." The Court will not command the Quarter Sessions to re-hear a case which that Court has heard or disposed of.

At p. 237 it is said: "When the Sessions have declined to hear a case or an appeal on a preliminary objection setting out the merits of the case, such decision may be reviewed by the Court of B. R. But the writ does not lie to command the Quarter Sessions to review their decision on an appeal, except in a case stated on the ground that the adjudication was not warranted by the evidence, the Court of Quarter Sessions being the sole judges of the effect of evidence laid before them; and it may be taken as a rule that when the Justices of the Peace, in or out of Sessions, have acted within their jurisdiction and duty, and according to the best of their judgment, mandamus will seldom be granted commanding them to review their judgment."

The confirmation of an appeal or its dismissal will not prevent a mandamus to hear it.

The authorities referred to support the doctrine of the text.

It is said also, at the same part of the work, the writ does not lie to command a justice to hear a charge of felony after it has been dismissed by the Sessions.

See also *Regina v. Phillimore*, 51 L. T. N. S. 205.

The writ was refused where the sessions upon an appeal declined to amend or hear the evidence, because they held the omission of certain words to be material in the conviction, and they quashed the conviction, the Court above holding there had been a decision by the Sessions on the merits: *Regina v. Justices of Middlesex*, 2 Q. B. D. 516.

The facts of this case show the Police Magistrate acted according to the best of his judgment, and not wrongfully. There had been one adjournment given to the defendant for the production of witnesses, and all the evidence was heard. The case was argued by the counsel, and stood over for judgment. The defendant, when the day for judgment arrived, asked again for a further adjournment for the production of other witnesses. Whether the Police Magistrate believed the application was for delay or for some other purpose, we do not know; but that further adjournment was a matter in the discretion of the magistrate, and we cannot say he acted erroneously in not granting it. We are of opinion, if the conviction had been moved to be quashed, and a motion had been made for an order *nisi* upon the magistrate and upon the prosecutor to shew cause why a writ of mandamus should not issue to the magistrate commanding him to hear the new witnesses, we would have been obliged to refuse or to discharge the motion.

As it is, it is quite clear we cannot allow the *certiorari* to stand, nor would that writ be the proper means to obtain the relief asked for, if we could have granted it. We must discharge the motion, and quash the *certiorari* as improvidently issued, with costs, to be paid by the defendant to the prosecutors.

The cases referred to in support of the charge here being a false pretence were: *Regina v. Abbott*, 1 Den. C. C. 273; *Regina v. Foster*, 13 Cox. C. C. 393; *Regina v. Ardley*, 12 Cox 23; *Regina v. Meakin*, 11 Cox C. C. 270; *Rex v. Pywell*, 1 Starkie's N. P. C. 402, which was overruled by *Regina v. Kenrick*, 5 Q. B. 49. See also *Regina v. Rowlands*, 2 Den. C. C. 386; *Regina v. Carlisle*, Dearsly's C. C. 337. The rule will be drawn up as above.

O'CONNOR, J., concurred.

ARMOUR, J., being absent at the Toronto Assizes, took no part in the judgment.

Judgment accordingly.

[CHANCERY DIVISION.]

BARCLAY ET AL. V. ZAVITZ ET AL.

Will—Devise of mortgage—Maintenance of wife—Principal and interest.

G. H. Z., in his will provided, with respect to a certain mortgage, "I give and bequeath out of the proceeds of said mortgage to each of my daughters (naming them) the sum of \$200 to be paid to them respectively when the youngest reaches the age of 21, and if any of them shall not have been married before that time the child or children being then unmarried shall not receive their shares until such times as she or they shall marry. Provided that my executors may pay such part or parts of said legacies to my married daughters before the youngest attains 21 if they can do so without interfering with the proper support of my wife and family. Provided if any of my daughters die without issue the legacy bequeathed to them shall be divided among their surviving sisters.

"The balance of the proceeds of said mortgage I give and bequeath to my said wife, to have and to hold the same for her use and benefit, and for the use and benefit of the unmarried members of my family, during the natural life of my said wife, after which my will is, that the balance of proceeds of said mortgage still remaining be equally divided among my daughters then surviving."

Held, that the widow held in trust during her life for herself and her unmarried daughter, and that she was bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried, treating the principal and interest of the mortgage as a blended fund, and what remained was to be divided; and that the widow had the right to draw *bond fide* from the proceeds of the mortgage even if it consumed the whole of the *corpus*.

A matter involving the proper construction of a will cannot be brought up on petition under R. S. O. ch. 107, sec. 35.

THIS was an action brought by Joshua Edward Barclay and Mary P. Hill, as executor and executrix of the last will and testament of George H. Zavitz, deceased, against Deborah Ann Zavitz, and the other children of the said George H. Zavitz, to obtain the opinion of the Court as to the construction of his will.

The statement of claim set out that George H. Zavitz duly made and executed his last will and testament, of which he appointed the plaintiffs executor and executrix, and in which he gave all his real and personal estate to the plaintiff Mary Permilla Zavitz or Hill (then his wife) with the exception of a certain mortgage, as to which he directed as follows:

"With respect to a certain mortgage bearing date * * my will is as follows: I give and bequeath out of the proceeds of said mortgage to each of my daughters Margaret Jane (married) (1), Deborah Ann (2), Elizabeth Ellen (3), Matilda Agnes (4), Dorothy Ann (5), Minnie Caroline (6), Mary Louisa (7), the sum of \$200, to be paid them respectively when the youngest of my said children reaches the age of twenty-one years, and if any of my said children shall not have been married before that time, the child or children being then unmarried shall not receive their shares until such times as she or they shall marry.

"Provided that my executors may pay such part or parts of said legacies to my married daughters before the said youngest child reaches the age of twenty-one years, if they can do so without interfering with the proper support of my wife and family.

"Provided, if any of my daughters die without issue the legacy or legacies hereby bequeathed to them shall be equally divided among their surviving sisters.

"The balance of the proceeds of said mortgage I give and bequeath to my said wife, to have and to hold the same for her use and benefit, and for the use and benefit of the unmarried members of my family, during the natural life of my said wife, after which my will is, that the balance of proceeds of said mortgage still remaining be equally divided among my daughters then surviving."

That the said George H. Zavitz was dead, and probate of his will had been granted to the plaintiffs: that the plaintiff Mary Permilla Zavitz was the wife of Andrew Hill: that Minnie Caroline one of the daughters died an infant: that Margaret Jane died without receiving her \$200 legacy, and that the defendants were the surviving daughters of the testator, and were all of age, except Mary Louisa who was an infant.

The matter originally came up on a petition under R. S. O. c. 107, s. 35, for the opinion of the Court, and was argued on October 22nd, 1884, before Boyd, C.

Bethune, Q. C., and *W. Johnson* appeared for the petitioners.

Maclennan, Q. C., contra.

The learned Chancellor held that it was not a matter to be brought up in that way, as it involved the proper construction of the will, but gave the following opinion :

October 29, 1884. *Boyd, C.*—This is not a matter to bring up under R. S. O. c. 107, s. 35, as it involves the proper construction of the will. It was so held in *Re Williams*, 1 Ch. Ch. 372, a case which has governed the practice in this country. I have, at the desire of the counsel, somewhat investigated the matters discussed, and I think the real and only contest as to the disposition of the proceeds of the mortgage arises between the widow and the daughters who may survive her, and these last are not represented on the petition. I have no doubt that the widow holds in trust during her life for herself and her unmarried daughter during infancy at all events and probably longer, if there is no *forsifamilia*, and that she is bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried. The gift to the wife is expressly for life, and (I think, as at present advised) with power to apply not only interest but the *corpus* of the mortgage to that support. The real question is, whether such a gift is to be treated as one of consumable property, which would give the widow the whole absolutely subject to the support of the child while unmarried, as in *Andrew v. Andrew*, 1 Col. 690; or, whether there is a substantial gift of what may remain at her death to which the then surviving daughters would be entitled, as in *Surman v. Surman*, 5 Mad. 123. There are many other cases not cited to me, which would require to be considered if the question was properly before me, and the representatives of the conflicting interests had made their arguments upon this point.

The infant's costs should be paid by the executors, but with that exception I make no order.

This action was subsequently brought, and was argued on motion for decree on June 10th, 1885, before Boyd, C.

Moss, Q. C., for the plaintiffs. The plaintiffs are the executor and executrix of the testator. The defendants are his surviving daughters, four of whom are adults and one an infant. The whole question is, what are the rights of the parties in the mortgage mentioned in the will. Are the legacies to be deducted from the principal money, and when are they payable? The period of vesting is when the youngest attains 21. The words "die without issue" mean an indefinite failure of issue. [J. Hoskin, Q. C. I think we are agreed on all the points except the last clause.] This case is similar to *In re Thomson's Estate, Herring v. Barrow*, 13 Ch. D. 144. I also refer to *Re Harris*, 7 Ex. 344.

J. Hoskin, Q. C., for the infant. In *Herring v. Barrow*, *supra*, there was no trust. In this case the mortgage was given for the benefit of the children as well as the widow. The words "balance of said mortgage" mean after the legacies have been deducted.

June 11, 1885. BOYD, C.—This matter has been again before me in an action properly framed so as to have the will construed by the Court. *Re Thomson Estate*, 13 Ch. D. 144, was cited upon the further argument. I adhere to what is said above, and decide definitely that what remains of the proceeds of the mortgage (principal and interest being treated as a blended fund) is to be divided among the daughters then surviving. The widow has the right to draw *bond fide* from the proceeds of the mortgage during her life as indicated in the will, even if that consumes the whole of the *corpus*. In other respects I confirm what is noted above.

G. A. B.

[CHANCERY DIVISION.]

THE EXCHANGE BANK OF CANADA V. STINSON.

Winding-up proceedings—Payment of cheques on deposit accounts after suspension of bank—45 Vic. ch. 23 (D).

The bank suspended payment September 15th, 1883. Winding-up proceedings were commenced November 22nd, and an order made December 5th. R. & G. H. purchased a stock of hardware held by the bank on which they owed \$14,000 at the time of the suspension. The bank wishing to close the account sold the balance of the stock to A. H. & Co., for \$5700, and agreed to accept in payment cheques of the defendant drawn on his deposit account, and which were drawn on and accepted by the bank on October 31st. For these cheques A. H. & Co. gave their acceptances which were duly paid. Before the stock was delivered R. & G. H. settled the balance of their debt to the bank. In an action by the liquidators of the bank against the defendant to recover back the amount thus paid on the defendant's cheques under 45 Vic. ch. 23, sec. 75, it was

Held, that the plaintiff could not recover, for the defendant had received no valuable consideration from the bank which he should be ordered to repay.

The defendant also owed A. H. & Co. a debt, and gave his cheque on the bank for \$92 in part payment thereof, which the bank accepted from A. H. & Co. on October 23rd, in retiring an overdue bill.

Held, that the amount could not be recovered back.

On November 19th, defendant sold his cheque for \$320 to his uncle, C., who was the local head of the bank, which cheque was negotiated and accepted by the bank on November 23rd, (after winding-up proceedings had commenced.)

Held, that, although it probably was an invalid transaction as far as the person who received the money was concerned, there was no payment to the defendant of anything within the scope and meaning of the 75th sec. of the Act.

THIS was an action brought by the liquidators of the Exchange Bank of Canada, by leave of the Superior Court of Quebec, against T. H. Stinson.

The plaintiffs' statement of claim set out that the bank suspended payment on September 15th, 1883, and had been, on November 23rd following, adjudged insolvent under the provisions of 45 Vic. c. 23, D., and an order had been made by the Superior Court of the Province of Quebec for the winding up of its affairs : that prior to the said 15th of September, and on the said date, the defendant was a depositor and had \$5,716.16 to his credit until November 23rd : that on said 23rd November the defendant drew four cheques for \$320.33, \$5,008.28, \$295.05, and \$92.50 respectively, which

were presented to and paid by the bank : that the bank was then insolvent, and proceedings to wind it up had been commenced : that the defendant was well aware that the bank was insolvent. And the plaintiffs charged that such payments were void as against the other creditors of the bank, under 45 Vic. c. 28, and that they should be repaid : that by reason of said payments the creditors of the bank were obstructed and delayed in the recovery of their claims, and the defendant obtained an unjust preference : and the plaintiffs claimed that the defendant should be ordered to repay the amounts.

The statement of defence admitted the suspension of the bank on September 15th, and the credit of \$5,716.16 and set up, as to the sums of \$5,008.28, \$295.05 and \$92.50, that R. & G. Hope & Co. were largely indebted to the bank on September 15th. 1883, and were unable to pay such indebtedness, and the bank held certain hardware in security, but such security, if forced into the market, was insufficient in value to pay such indebtedness in full, and the bank in October, after the suspension and before any winding-up proceedings were contemplated, and while the bank believed itself to be solvent, decided to realize said securities and wishing to receive the highest price therefor offered to sell to Adam Hope & Co., certain of the said hardware, and to accept in part payment therefor the defendant's cheques for \$5,008.28 and \$295.05, and the bank also offered to accept the defendant's cheques for \$92.50 in part payment of a note due by R. & G. Hope to the bank, and to take over certain other assets of said R. & G. Hope & Co. in full discharge of all claims and demands of the bank against them ; and in pursuance of this arrangement the defendant gave his said cheques to Adam Hope & Co., who paid them to the bank as part of the price of the said hardware and paid the residue of the purchase money to the bank, who received the same and the said other securities from said R. & G. Hope & Co., and delivered the hardware to Adam Hope & Co., who afterwards repaid the defendant, and the bank also

released R. & G. Hope & Co. from all claims and demands; and the whole transaction took place and was concluded before the 23rd of November, and while all parties *bond fide* believed the bank was solvent and would resume its business and pay its creditors in full: that the said transaction was *bond fide*, and made with a view of protecting the bank against loss on the debt of R. & G. Hope & Co., and not with a view of giving the defendant a preference.

As to the \$320.33 cheque, the statement of defence alleged that the defendant sold it at par, and received payment in full for it, to a debtor of the bank, who with the bank's consent, and long prior to November 23rd, applied it in full of his liabilities to the bank, and who would otherwise have been unable to pay his indebtedness to the bank, and that it was done *bond fide*, and not with a view to obtain any preference.

The action was tried at the Spring Sittings at Toronto on May 9th and 11th, 1885, with an action of *Exchange Bank v. Counsell*, reported *post*, p. 673, before Boyd, C.

The facts as found on the evidence appear in the judgment.

MacLennan, Q.C., and *Bain*, Q.C., for the plaintiffs. All the transactions except the \$92.50 cheque were within thirty days of the application to wind up and consequently came within 45 Vic. ch. 23, secs. 71, 72 and 74. A cheque is a bill of exchange by a customer on a banker, and its effect is practically the same. The customer is only a creditor. The contract is entirely between the customer and the banker. The cheques gave third persons no rights against the bank: *Hopkinson v. Forster*, L. R. 19 Eq. 76. A cheque given to a third party, when paid by the bank, is merely a mode of payment to the customer by the bank, and by the payment to the third person the obligation of the bank to pay the customer is discharged: *Churcher v. Cousins*, 28 U. C. R. 540; *Churcher v. Stanley*, 24 Gr. 217; *Botham v. Armstrong*, 24 Gr. 216; *Miller v. Reid*, 29 C. P. 576, S. C. 4 A. R. 479. There was no assignment by

virtue of these cheques which got rid of the law as to set-off. There was no purchase of the \$320 cheque by Counsell. Counsell was the agent of the bank, and it was at his suggestion that the matter was arranged. Counsell was not a debtor to the bank.

E. Martin, Q. C., for the defendant. The case against Stinson which, as put, was to recover certain sums of money paid by way of fraudulent preference to him, fails altogether. There is no evidence of fraud or contrivance whatever. Sec. 57 of 34 Vic. ch. 5, contemplates a suspension by the bank for ninety days. See also 45 Vic. ch. 23, sec. 6, sub-sec. *a*, secs. 10 and 11, which must all be read together. By sec. 60 of the Act, the law of set-off applies up to the date of the winding-up: *Lindley on Partnership*, 4th ed., vol. 2, 1271; *In re Wiltshire Iron Co.*, L. R. 3 Ch. 443. A completed transaction will be upheld if finished before the winding-up order is granted. The action must be brought against the Hopes if any one, and not against Stinson: *Smith v. Hutchinson*, 2 A. R. 405 *Nelles v. Paul*, 4 A. R. 1. The prices paid for cheques, bills, and deposit receipts, corroborates the view taken by everyone that the bank would resume business and was not crippled. The directors must have power honestly to compromise claims pending suspension and prior to the winding up.

MacLennan, Q.C., in reply. The bank was debtor to no one in this transaction but Stinson, and having accepted the cheque was bound by that act: *Robson v. Bennett*, 2 Taunt 388. The powers of the directors continue after suspension but subject altogether to the provisions of the Act: *Fletcher v. Manning*, 12 M. & W. 571. The Bankruptcy Court in England can ratify such a proceeding, but no ratification can be had here.

May 26, 1885. BOYD, C.—The Exchange Bank suspended payment on the 15th of September, 1883. A petition for winding up was presented to the Court on the 22nd of November, 1883, which was followed by the

usual winding-up order on the 5th December. The evidence established that the bills of the bank were taken at par for goods during October, and that deposit receipts and certified cheques were readily saleable at from 4 to 5 per cent. discount down till the time that the manager absconded in the beginning of December, 1883.

Having regard to this comparatively hopeful state of affairs I do not think that the chief transaction complained of in the *Stinson Case* can be in any respect successfully impeached. Briefly stated, it resulted from the following transactions: R. & G. Hope purchased a stock of hardware held by the bank, on which they owed \$14,000 at the time of the bank's suspension. The bank was anxious to clear off this debt, and agreed to sell what was left of this stock (secured to them by warehouse receipt) to Adam Hope & Co. for \$5,700. The bank agreed to accept payment for this in cheques of the defendant drawn upon his deposit account then in the bank. Cheques for this sum were accordingly drawn and accepted by the bank on the 31st of October. For these cheques Adam Hope & Co. gave their acceptances, covering a period of several months, to the defendant, which were paid in due course. The bank manager, however, refused to deliver the stock so bought by Adam Hope & Co. unless R. & G. Hope settled the balance of their debt, and this that firm did early in November by turning over various securities in the shape of open accounts, bills receivable, &c. Upon this basis the whole claim of the bank against R. & G. Hope was satisfied, and the goods bought by Adam Hope & Co. were forwarded to that firm. The evidence leads me to regard this as a fair business transaction all round, in which the bank officers drove a good bargain, and by which they succeeded in realizing a fair price for the goods they held in security from R. & G. Hope. I can see no reason for isolating one part of this quadruple arrangement and ordering the defendant to repay the amount of his cheques under any section of the Act relating to Insolvent Banks (45 Vict. cap. 23, D.)

Of a like nature is the dealing in connection with the small cheque for \$92. The defendant owed Adam Hope & Co. an account for glassware, and in part payment gave this cheque to that firm on 8th October, 1882. That firm were taking up an overdue bill at the bank, and applied this cheque upon that debt, which the bank accepted on 23rd of October.

The third matter complained of is of a more suspicious character. On the 19th November the defendant sold his cheque for \$320 to his uncle Mr. Counsell, who was the Hamilton head of the Exchange bank. That was negotiated and accepted by the bank on the 23rd November after the winding-up proceedings had begun, and it would be probably an invalid transaction, so far as the person who received value from the bank for that cheque is concerned, but there was no payment to the defendant of anything within the scope and meaning of the 75th section of the Act, and it is attacked only under that section.

The result is, that all the alleged payments of which recovery is sought cannot be attacked in this action, for the short reason that the defendant received no money or valuable consideration from the bank which he should be ordered to repay.

The action will have to be dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

THE EXCHANGE BANK OF CANADA V. COUNSELL ET AL.

Winding-up proceedings—Payment to creditors—45 Vic. ch. 23 sec. 75.

The bank suspended payment September 15th, 1883. Winding-up proceedings were commenced November 23rd, and an order made December 5th. The defendants C. & S. being depositors in the bank drew a cheque for \$4000 on November 1 on their deposit account, which was given to D., a debtor of the bank on notes maturing the following December and January. D. gave mortgage security to defendants for the cheque on October 31st. The arrangement was all made about October 5th, although the security was not given until the 31st, and the cheque was not presented to the bank until November 23rd, when it was accepted as payment of the maturing notes.

In an action by the liquidators of the bank against the defendants, to which D. was not a party, to recover the amount thus paid on the cheque as having been paid to defendants after the winding-up proceedings were commenced, and being an unjust preference &c.

Held, that upon the facts there was no payment by the bank to the defendants, and that the transaction therefore was not within the statute 45 Vic. ch. 23 sec. 75.

C. who was being sued by the bank, obtained defendants' cheque for \$2,118 giving security therefor on November 21st, and retired the notes in suit on November, 23rd.

Held, that the defendants could not be ordered to repay the amount of the cheque, as being a wrongful payment under the Act.

THIS was an action brought by the liquidators of the Exchange Bank of Canada by leave of the Superior Court of Quebec, against C. M. Counsell and T. H. Stinson.

The plaintiffs' statement of claim set out that the bank suspended payment, had been adjudged insolvent under the 45 Vic. c. 23, D., and the winding-up order, as in the previous case: that prior to the said 15th of September, and on the said date, the defendants were depositors and had \$6,118.03 to their credit until November 23rd: that on the said 23rd of November the defendants drew two cheques for \$4,000 and \$2,118.03 respectively, which were presented to and paid by the bank: that the bank was then insolvent, and proceedings to wind it up had been commenced: that the defendants were well aware that the bank was insolvent; and the plaintiffs charged that such payments were void as against the other creditors of the bank under 45 Vic. ch. 23, D.; and

they claimed that the defendants be ordered to repay the amounts.

The statement of defence admitted the suspension of the bank on September 15th, and the credit of \$6,118.03; and set up that one Duncan was, with others, indebted to the bank on certain notes that he was unable to pay, and that in October he applied to the bank to accept payment of his liabilities in cheques of depositors with plaintiffs on the terms of his paying his liabilities in full: that the plaintiffs accepted this proposal in October, and in October and November, and long prior to the commencement of the winding-up proceedings, the said Duncan gave security to the defendants for the \$4,000, and gave their cheque for that amount to the said Duncan, who paid it with other cheques on the plaintiffs to them in full of his liabilities: that this was done before the commencement of the winding-up proceedings, and while the bank believed itself to be solvent and able to pay its debts in full, and the defendants and Duncan believed the same; and that the transaction was *bond fide* in every respect, and done with a view of protecting the bank against loss upon the liability of Duncan, and not with a view of giving the defendants a preference.

As to the \$2,118.03, the statement of defence set out that one John Creen was being sued by the bank on certain notes, and that he made a similar proposal to the bank at the same time, and it was accepted and carried out at the same time and in the same manner, and under similar circumstances as the Duncan matter.

The action was tried at the spring sittings at Toronto on May 9th and 11th, 1885, with an action of *Exchange Bank v. Stinson*, reported *ante*, p. 667, before Boyd, C.

The facts as found on the evidence appear in the judgment.

The same counsel appeared in this case as in *Exchange Bank v. Stinson*, and the same line of argument was followed.

Maclellan, Q.C., and Bain, Q.C., for the plaintiffs.
E. Martin, Q.C., for the defendants.

May 26, 1885. BOYD, C.—The transaction of the defendants with \$4,000 of the claim now in question was this. They drew a cheque on the Exchange Bank for that amount on the 1st of November, 1883, and had sufficient funds at their credit to answer this demand. This was given to Duncan and Muir, debtors of the Bank on notes maturing in December, 1883, and January, 1884. As a consideration for this cheque Duncan gave security for payment of the \$4,000 by way of second mortgage on some land to the defendants, executed 31st of October.

The transaction had all been arranged about the 5th of October, though it was not carried out, so far as giving the security was concerned, till the end of that month, and the cheque was not presented to the bank till the 23rd of November, when it was accepted as an equivalent for the maturing paper in respect of which Duncan and others were debtors. By means of this cheque that paper was retired. The bank might properly have refused to honour that cheque, and in such an event Duncan would have been remitted to his rights against the defendants—but the bank having treated the cheque as a payment made by Duncan and others, the security given by Duncan to the defendants became unimpeachable in their hands.

If it was illegal and contrary to the statute to make what was practically payment of the defendant's cheque to Duncan and others on the 23rd of November, (because of the commencement of the winding-up proceedings on the 22nd of November, or for any other reason) then the transaction should be attacked in such a way as to bring all parties before the Court. I do not see how it is possible to proceed against the defendants to make them individually account for this \$4,000 upon a statement of claim alleging that there was an illegal pay-

ment of that sum upon their cheque in the circumstances above detailed. Upon the facts I do not find any payment by the bank to the defendants.

As to the residue of the claim of \$2,118 in this action, the manner of dealing was pretty much the same.

One Creen, who was indebted to the bank, was sued upon instructions that the claim should be promptly realized. Upon the suggestion of the defendant Counsell, Creen, who was in difficulties, procured the defendants' cheque for \$2,118 on the 21st of November, and by means of this retired the notes in suit upon the 23rd of November. Creen gave a mortgage upon his mill to secure the amount of this cheque to the defendant Counsell, who paid back to the trust estate, represented by the defendants, the above amount. But I am again not in a position upon this record to deal with one section of this transaction.

It may be that because of the commencement of the winding-up proceedings the negotiation of this cheque was illegal, and the value of it may be recoverable from Creen—who might in that event be able to claim recoupment from the defendants—but I cannot, upon this statement of claim, order the defendants to repay the amount of this cheque to the liquidators as being a wrongful payment to them under sec. 75 of the Act—(45 Vict. cap. 23.)

As between the defendants and the bank it seems to me that the transaction impeached is not covered by the terms of the Act, and that it would be an extension and not an application of its provisions to decree in favour of the plaintiffs.

By such an expedient as this the policy of the Act may be evaded, but as was observed in *Miller v. Harvey*, 6 A. R. 205, in an analogous case, that is a matter for the Legislature and not the Court to deal with.

This action will have to be dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

SMITH V. SMITH.

Will—Devise—Rule in Shelley's Case—Life estate.

J. S. by his will devised as follows: "I will and bequeath to my son J. S., for the term of his natural life, the farm I purchased * * but if my said son J. should leave lawful heir or heirs, then said lands shall be equally divided among them on the death of their father, but if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands shall be sold and the proceeds thereof to be equally divided among my remaining children or their heirs."

The son J. S. had been married for some years at the date of the will, and had a daughter after that date, who with her father was living at the time of the testator's death.

Held, that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee, under the rule in *Shelley's Case*.

THIS was an action brought by Joshua Smith to obtain the opinion of the Court upon the construction of a clause of the will of his father John Smith.

The executors of the will, the plaintiff's only child, the plaintiff's only brother, only surviving sister, the husband of a deceased sister and his children, were all added as parties defendants, being the only parties interested in the will.

The statement of claim set out that John Smith, the father, made his will dated the 3rd of January, 1880, and died in or about the month of May following without altering it: that he died seized of certain lands, being the farm mentioned in the said will as having been purchased from John Bedell: that in and by the said will he made the following bequest of the said lands: "Fourthly, I will and bequeath to my son Joshua Smith for the term of his natural life the farm I purchased from John Bedell, less the twenty acres above referred to; but if my said son Joshua should leave a lawful heir or heirs, then said lands shall be equally divided among them on the death of their father. But if my said son Joshua Smith shall die without leaving lawful heirs, then in that case I direct the said lands shall be sold, and the proceeds thereof to be equally

divided among my remaining children or their heirs": that the plaintiff was married November 1st, 1871, but had no children until September 25th, 1880, when a daughter (an infant defendant) was born, and is still living. And the plaintiff submitted that in and by the terms of the said will he was the owner in fee simple of the said lands.

The usual defence was put in on behalf of the infant defendants.

The action was tried at the Spring Sittings held at Hamilton on March 30th, 1885, before Boyd, C.

Carscallen, for the plaintiff. The plaintiff is entitled to an estate in fee tail in the property under the fourth clause of the will, under the rule in *Shelley's Case*. See also *Bowen v. Lewis*, L. R. 9 App. Cas. 890; *Little v. Billings*, 27 Gr. 353; *Tyrwhitt v. Dewson*, 28 Gr. 112.

Bruce, for the infants. The will itself explains that the testator meant, when he used the words "lawful heir or heirs," to designate "child or children" of Joshua, when he said the property was to be divided equally among them on the death of "their father": R. S. O. c. 106, s. 31; *Andrew v. Andrew*, 1 Ch. D. 410. *Bowen v. Lewis*, *supra*, was decided under the law in existence before our Wills Act.

April 22, 1885. BOYD, C.—The clause before me for construction reads thus: "I will and bequeath to my son J. S. for the term of his natural life the farm, &c., but if my said son J. S. should leave a lawful heir or heirs then said lands shall be equally divided among them at the death of their father. But if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands to be sold, and the proceeds divided equally among my remaining children or their heirs."

The testator has himself interpreted the first words, "lawful heir or heirs" to mean child or children, by declaring that the farm is to be divided among them at the death of their father: *Jordan v. Adams*, 9 C. B. N. S.

483. I incline to think that the same meaning attaches to it in the next clause relating to his dying "without leaving lawful heirs." That last clause does not, at all events, derogate from the estate of this child if she should survive the father. What the construction would be if she predeceased her father I am not called upon to decide. There is no reason to depart from the obvious meaning of the testator, which was to limit an estate for life to his son with remainder to his child or children. A child has been born to him, and it is needless now to discuss nor was it argued as to the estate of that child during the life of the father. It is sufficient for the purposes of this action to negative the claim of the plaintiff to be either tenant in fee simple or in fee tail in possession of the farm in question, while this child lives. I refer also to *North v. Martin*, 6 Sim. 266, and *Gummoe v. Howes*, 23 Beav. 184.

The action is dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

PELLS V. BOSWELL ET AL.

Opening up and extending street—Local improvement by-law not in public interest—Enjoined from proceeding under it.

P. owned a small piece of land at the south end of a lane or street called Johnson street, 26 feet wide in the City of Toronto, leading from Adelaide street to King street, extending nearly to the line between these streets, and continued to King street by an irregular private footway. M. and T. owned the adjoining lots on King street, extending back to the centre line, and P. had refused to sell his piece of land to them. They then, with other owners purporting to be owners of adjacent land, petitioned the city council under the local improvement clause of the Municipal Act, reciting that they "were desirous of securing communication between King and Adelaide streets for vehicles by means of the above street, and certain lanes to the south thereof," and asking that said street might be opened up of the full width of 26 feet from Adelaide street to the centre line of the block between King and Adelaide streets at the expense of the property benefited. The sub-committee of the council, to whom this petition was referred, and before whom the plaintiff had appeared to oppose it, said that nothing further should be done without notifying him, but about eight months afterwards, without any further notice to him, they passed a by-law opening up the lane to the centre of the block as prayed, but making no provision for extending it to King street. It was shewn that M. and T. through whose land such extension would pass, had refused to give a right of way for vehicles, as expressed in the petition, and had agreed to pay all costs of opening the lane.

Held, that the by-law had been passed improperly, not in the public interest, but in that of M. and T.; and the corporation on the application of P. was enjoined from proceeding under it.

That a by-law purports to be for local improvement, and not for the general benefit of the municipality, does not affect the principle which prevents corporate powers from being exercised for the benefit of one individual at the cost of another.

THIS was an action brought by Thomas Pells against Arthur R. Boswell as Mayor, John Blevins as City Clerk, and the Corporation of the City of Toronto, for an injunction to set aside a by-law and restrain the defendants from taking any proceedings thereunder.

The plaintiff's statement of claim set out that he was, at the time of the passing of the by-law, and still is, the owner of certain property on the west side of Johnson's lane in Toronto, and also of a parcel of land situate at the south end of said lane, between the said south end and the centre line of the block between King and Adelaide streets in Toronto: that about May, 1884, the plaintiff became aware that a by-law had, at the instance of Alex. Manning and M. A. Thomas, been introduced into the Council of

Toronto entitled, "A by-law to extend, open up, and establish, Johnson street in the Ward of St. Andrew;" that said by-law had been introduced on the petition of the said Alex. Manning and others, which petition was in the words following :

"To the Council of the Corporation of the City of Toronto :

"The petition of the undersigned, being owners of the real property situate adjacent to and fronting or abutting on Johnson street, otherwise known as Johnson's lane, in the Ward of St. Andrew, and owners of lands interested in the improvement of said street, Humbly sheweth :

"That your petitioners are desirous of securing communication between King street and Adelaide street for vehicles, by means of the above street and certain lanes to the south thereof, and for this purpose it is necessary and they desire to have Johnson street aforesaid extended, opened up, and established as a public street, of the full width of twenty-six feet from Adelaide street southward to the centre line of the block between King street and and Adelaide street, being the southern limit of lot number three on the south side of Adelaide street, west of Yonge street; and they also desire to have a cedar block pavement constructed thereon within the limits aforesaid, and to have the same done and the said pavement constructed as a local improvement by special assessment according to the conditions and regulations adopted by the Committee on Works and prefixed hereto, and under the provisions of the Consolidated Municipal Act of 1883, and amendments thereto.

"Your petitioners therefore pray that the said street may be extended, opened up, and established as a public street or highway as aforesaid, and that a cedar block pavement may be constructed thereon and therein, and that all necessary steps may be taken, by-laws passed, and assessments made for the purpose. And your petitioners will ever pray.

(Sgd.) Alexander Manning. (Sgd.) Neil C. Love,
(Sgd.) M. A. Thomas. Executor to Drummond
(Sgd.) H. A. Drummond. estate.
(Sgd.) Jethro Warden. (Sgd.) W. V. Carlyle.
(Sgd.) John Kay. (Sgd.) Mason & Risch,
per Robert S. Gourlay.

Toronto, May 9th, 1884."

86—VOL. VIII O.R.

That the plaintiff immediately took steps to oppose said by-law, and petitioned the council against the same: that the sub-committee to whom it was referred, and before whom the plaintiff and his solicitor appeared to oppose the by-law, disapproved of said by-law, and agreed that nothing further should be done without notifying the plaintiff; but that afterwards on the 12th January, 1885, the Council of the defendants assumed to read a third time and pass a document purporting to be a by-law in the words and figures following:

No. 1529. A BY-LAW.

To extend, open up and establish Johnson Street, in the Ward of St. Andrew.

[Passed January 12th, 1885.]

WHEREAS, Alexander Manning and others have, by their petition presented to this Council pursuant to the Statute in that behalf, represented that it is desirable and necessary to extend, open up, establish and improve Johnson Street, otherwise known as Johnson's Lane, in the Ward of St. Andrew, as a public highway, from Adelaide Street southerly to the centre of the block between Adelaide Street and King Street, at the expense of the property benefited;

And whereas it is expedient to grant the prayer of the said petition;

Therefore the Council of the Corporation of the City of Toronto enacts as follows:

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That Johnson Street, in the Ward of St. Andrew, in the City of Toronto, be opened up southerly to the centre of the block between Adelaide Street and King Street, and that the line of road or street surveyed and laid out by Messieurs Unwin, Browne & Sankey, Provincial Land Surveyors, as appears by their description and plan of survey of the same dated the third day of May, one thousand eight hundred and eighty-four, and which is particularly described as follows, that is to say: All and singular that certain parcel or tract of land and premises, being composed of part of Town Lot number three, on the south side of Adelaide Street, west of Yonge Street, in the City of Toronto, and which may be more particularly known and described as follows, that is to say: Commencing at a point on the south side of Adelaide Street aforesaid, distant two hundred and fifty feet westerly from the intersection of the west limit of Yonge Street with the south limit of Adelaide Street, said point being the intersection of the west face of the west wall of the Grand Opera House; thence southerly along said face of said wall two hundred and five feet and ten inches to the centre line of the block between Adelaide Street and King Street; thence westerly along said centre line twenty-six feet; thence northerly parallel with the west face of said wall two hundred and five feet and ten inches to the south limit of Adelaide Street: thence easterly along the south limit of Adelaide Street twenty-six feet to the place of beginning; be and the same is hereby established and confirmed as a public highway, to be known and designated as Johnson Street, in the Ward of St. Andrew, in the City of Toronto, and that that portion

(if any) of the said above described lands not heretofore dedicated for street purposes be and the same is hereby taken and expropriated for and established and confirmed as part of the said street, and that the said Johnson Street, as above described, be forthwith opened up throughout its whole length to the use of the public under the direction of the City Engineer, who, with servants, workmen, agents and contractors, is hereby authorized to enter into and upon the same and every part thereof for the for the purposes aforesaid.

I certify that I have examined this Bill, and that it is correct.

JOHN BLEVINS,

City Clerk.

COUNCIL CHAMBERS,

Toronto, January 12th, 1885.

[L. S.] ARTHUR R. BOSWELL,
Mayor.

That neither the sub-committee nor the Council notified the plaintiff of their intention to proceed with said by-law, and it was passed without an opportunity being given to him to object to same: that the only land that can be taken or expropriated under said by-law is a piece belonging to the plaintiff, which separates the south end of said lane from the properties of said Manning and Thomas, which they have tried to obtain from the plaintiff and the former owner, one Clarke, and having failed to do so sought to obtain it by means of the said by-law: that the said Council pretended to pass said by-law in the public interest, but the facts were that it was passed in the private interests of Manning and Thomas and was therefore illegal: that the signatures to the petition were obtained by misrepresentation: that the petition is framed to mislead, in first setting out that it was desirable to secure communication between King and Adelaide streets, and in the prayer only asking to have Johnson's lane opened up to the centre line of the block, and so gave no communication for vehicles between Adelaide and King streets.

The defendants' statement of defence denied any irregular or improper conduct, and claimed that the by-law was regularly passed, and that they had full power and authority to pass it and proceeded in the exercise of their discretion in doing so.

An interim injunction was granted on 21st January, 1885, by Boyd, C., and continued on 17th March by Ferguson, J., to the trial, both parties agreeing thereto; and the action came on for trial at the sittings at Toronto on May 19th and 20th, 1885, before Boyd, C.

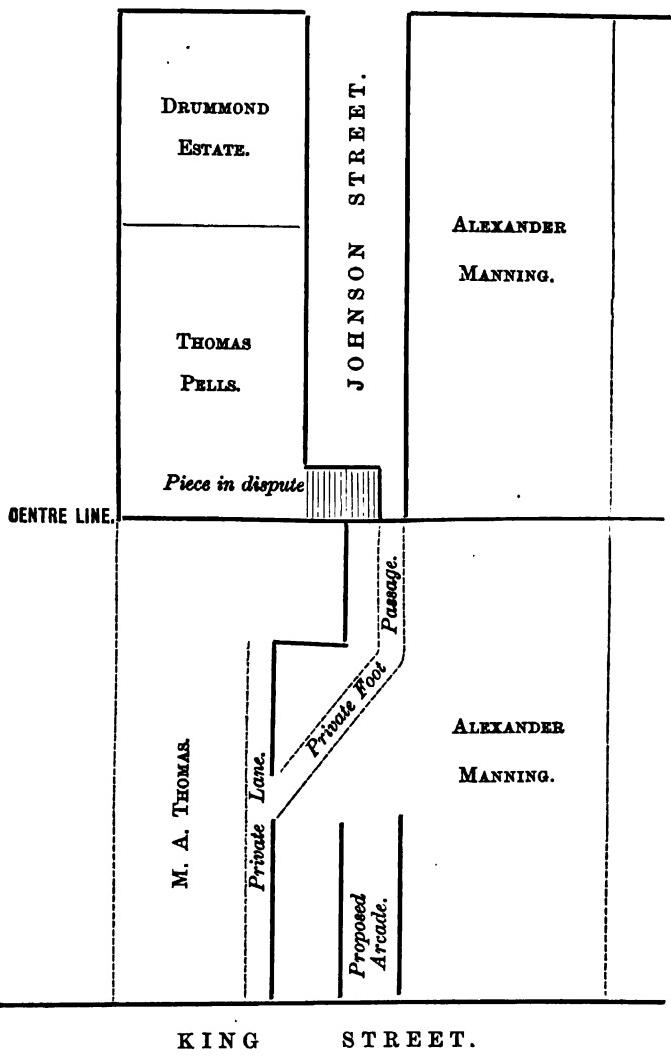
The position of the lane and property in question is shewn by the sketch on opposite page.

H. D. Gamble, for the plaintiff. The plaintiff is entitled to have his injunction made perpetual. The evidence shows that no sufficient opportunity was given to him to oppose the by-law; that he was entitled to be heard by the Council, and the sub-committee never having reported, he never was heard by the Council: *Re Morrell and The City of Toronto*, 22 C. P. 326; *Wilson v. Port Hope*, 2 Gr. 384. The by-law is uncertain, the property to be taken not being sufficiently described, and it being left to arbitration to try the question of title to plaintiff's lands: *In re the Corporation of the Town of Ingersoll v. Carroll*, 1 O. R. 488. The evidence shows that the names to the petition were obtained by misrepresentation, and all the names, but Manning's and Thomas's were afterwards withdrawn. The by-law was passed altogether in private interest, namely for the benefit of Manning and Thomas: *In re Vashon and the Corporation of the Township of East Hawkesbury*, 30 C. P. 194; *In re Morton and the Corporation of the City of St. Thomas*, 6 A. R. 323. The plaintiff is entitled to apply for an injunction instead of applying to quash the by-law: *In re Webster and the Corporation of the Township of West Flamborough*, 35 U. C. R. 590, at 594; *Helm v. The Corporation of the Town of Port Hope*, 22 Gr. 273, at 278; *Holland v. Baltimore*, 11 Maryland 186; *Bouldin v. Baltimore*, 15 Maryland 18.

W. A. Foster, and *W. G. McWilliams*, for the defendants.

The by-law in question is a local improvement by-law, and all prescribed formalities were observed; the petitioners for the passage of the by-law were sufficient in regard to

ADELAIDE STREET.



two-thirds in number and one-half in value representing the property to be benefited. The plaintiff petitioned the Council against the passage of the by-law, fully setting forth his reasons, but did not ask an opportunity of being heard before the Council, as he might have done under sec. 292 of Con. Mun. Act 1883 (46 Vic. ch. 18). The committee on works had not been clothed with power to take evidence, but even when he was before that committee the plaintiff tendered no evidence, but was fully heard. The Council read the by-law a third time without any notice from the plaintiff that he desired to be heard. That the by-law is in the interest mainly, or even entirely, of a class or of an individual is no objection where the statutory requisites are complied with, otherwise every local improvement by-law is open to the same objection. The improvement is to be made at the expense of the property affected, including the petitioners' property; the petitioners are expressly required to bear the expense connected with the by-law (sec. 546). It is not so much a question of public benefit as of compliance with the statutory provisions. It is immaterial what arrangements the petitioners make among themselves. *Re Peck and the Corporation of the Town of Galt*, 46 U. C. R. 211, and *Morton and the Corporation of the Town of St. Thomas*, 6 A. R. 323, were not cases of local improvement by-laws. Plaintiff is not injured; he obtains the compensation for his property expropriated by means of arbitration under the Act, and his adjacent property is only taxed to the extent to which it is benefitted.

The further facts of the case appear in the judgment.

May 26, 1885. BOYD, C.—That a by-law purports to be for local improvement, and not for the general benefit of the municipality, does not affect the cardinal principle which governs the exercise of corporate powers, as well expressed by Osler, J., in *Re Morton and St. Thomas*, 6 A. R. 325, to this effect: "Corporations are trustees of their powers for the general public, and when they pros-

titute them for the benefit of one individual at the cost of another, the general public not being interested, their action will be restrained by the Courts."

It is impossible to come to any other conclusion, after hearing the testimony and perusing the documents in evidence in this case, than that the impeached by-law was passed in the sole interest of Messrs. Manning and Thomas, and to the detriment of the plaintiff.

The "true inwardness" of the by-law would be properly illustrated if it were entitled "A by-law to coerce the expropriation of Pell's land at the foot of Johnson's lane or street, which he refuses to sell at a reasonable price to the adjoining proprietors." The only property owners upon Johnson's lane or abutting thereon are Manning, Pells, and the representatives of the Drummond estate.

If the lane is opened up, as prayed by the petition and by-law, it would extend to the rear of the property of Mr. Thomas. Manning and Thomas have been for some years very anxious to purchase the strip of land now owned by the plaintiff, and have offered \$1,500 therefor at different times, but a larger sum was demanded. The expedient of a petition was then resorted to in May, 1884, by which the City Council was prayed to open up this lane to the centre line of the block between King street and Adelaide street. This would bring the lane down to the rear of Thomas's lot on King street, and also give a wider open space at the rear of Manning's lot.

There is an opening for foot passengers of a private character now used, and which has been for many years in existence between this lane and King street. But to give a colour of general benefit to the application for a by-law, the petitioners set forth that "they are desirous of securing communication between King and Adelaide streets *for vehicles* by means of the above street and certain lanes to the south thereof." These lanes for vehicles would be of necessity through the property of either Manning or Thomas, but it is well established that neither of them contemplates giving a right of way for vehicles as

expressed in the petition. It was certainly refused when the matter was before the sub-committee of the Council, to whom it was referred. The by-law as passed simply provides for opening up and extending Johnson street to the centre of the block, and for expropriating such land (if any) as may be needed therefor.

It is evident, and was indeed proved by the alderman who had the by-law in charge, that taking it *per se* it would as a matter of public benefit amount to nothing. It was justified only as the first step or instalment of a scheme which should afterwards be carried out by Messrs. Manning and Thomas. But their manner of carrying out the subsequent instalments would be an arbitrary matter resting in their own hands and to be used for their own convenience.

Contemporaneously with the petition Messrs. Manning and Thomas signed an agreement (*a*) setting forth "that they were individually interested in the opening of this lane in the rear of their premises, for the purpose of acquiring access by said lane from their premises," and that the

(*a*) Know all men by these presents that we, Alexander Manning of the City of Toronto, in the County of York; contractor, and Milton Augustus Thomas, of the same place, hotel keeper, are jointly and severally held and firmly bound unto Neil C. Love, of the same place, Esquire, William P. Marston, of the same place, Gunsmith, and _____ Drummond, of the same place, widow, executors and executrix of the last will and testament of John W. Drummond, late of the same place, gentleman deceased, in the penal sum of five thousand dollars of lawful money of Canada, to be paid to the said Neil C. Love, William P. Marston, and _____ Drummond, the survivor or survivors of them or to the attorney executor or administrator of the survivor of them, for which payment well and truly to be made we jointly and severally bind ourselves our and each of our several and respective heirs executors and administrators and every of them forever, firmly by these presents sealed with our several and respective seals. Dated this sixth day of June, one thousand eight hundred and eighty four.

Whereas the said obligors are desirous of procuring the Council of the corporation of the City of Toronto to pass a by-law for the opening up and establishing of Johnson street in the ward of St. Andrew, in the City of Toronto of the full width of twenty-six feet to the centre of the block between King street and Adelaide street and requested the said obligors to join in a petition to the said council therefor.

And whereas the said obligors as such executors as aforesaid represented a small portion of the lands fronting on the said Johnson street which would not be so materially benefited as the lands of the obligors by the opening of said street and the said obligors proposed consenting and agreeing to the opening up of said street as aforesaid and joining in the

petitioning of the city was being done for their immediate benefit and convenience; and they agreed to contribute equally to the payment of all costs incurred and to be incurred in opening the lane, making special mention in that connection of "the purchase of the right of way over property claimed by a person named Pells, which claim will be decided by arbitration by direction of the corporation."

The only persons who had, strictly speaking, a right to petition were the property owners on the lane or street, whom I have mentioned. The signature on behalf of the Drummond estate was given upon a belief that the purport of the petition was to open up Johnson street to King street; but any objections on this score were silenced by a bond being given to the representatives of that estate by Mr. Manning, dated 6th June, 1884, by which he agrees "to indemnify that estate from and against all costs and charges, loss, damages, and expenses which may arise out of, or be incurred or assessed in respect of, the said proposed opening up and establishing of Johnson street pursuant to the prayer of the said petition."

petition therefor, that they the said obligors would indemnify and save harmless the said obligees and the lands of and belonging to the estate of the said late John W. Drummond, of, from and against all cost and charges, loss, damage and expense which might arise out of or be incurred or assessed in respect of the said proposed opening up and establishment of Johnson street pursuant to the prayer of the said petition by the said Council.

And whereas the said Council have introduced a by-law to give effect to the said petition, and these presents have been prepared and executed in pursuance of the said agreement.

Now the condition of the above obligation as such that if the above bounden Alexander Manning and Milton Augustus Thomas their executors or administrators do and shall well and truly and faithfully in all respects observe keep and perform their said agreement and promises as above set forth and do and shall indemnify and save harmless the said obligees and each and every of them and their heirs executors and administrators, and the estate and lands of the said John W. Drummond, of from and against all assessments, liens, charges, taxes, rates, and incumbrances, and against all loss, costs, charges, and expense arising out of or in any way connected with or imposed or incurred by reason of the establishment and opening up of Johnson Street as proposed in the said petition. Then the above obligation to be null and void, otherwise to remain in full force and virtue.

Signed Sealed and executed in presence of Sgd. W. G. McWILLIAMS.	}	Sgd. ALEXANDER MANNING, " M. A. THOMAS.
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87—VOL. VIII O.R.

The sub-committee to whom the matter was referred by the Council heard the parties interested for and against and took no action, because it was considered to be a matter more of private than public interest, and the parties were advised to settle it themselves. A promise was given by that sub-committee, and relied on by the plaintiff, that no further action would be taken without his being notified. This was not done, and after the matter had remained in abeyance for seven or eight months, the by-law was passed by the expiring Council, in order, as was said, to leave a clean sheet behind them.

All the direct evidence, and all the circumstances of the case make against the efficacy of this by-law as a *bond fide* piece of municipal legislation. When the facts are examined there is not even a colour of public interest attaching to its enactment or its provisions. The whole thing is palpably passed in the interests of two individuals, who object to pay what the plaintiff seeks to get for this coveted strip of land.

Having regard to the pleadings and evidence it is my duty to continue the injunction as prayed, so far as the plaintiff's land is affected thereby, and to give the plaintiff his costs.

G. A. B.

[COMMON PLEAS DIVISION.]

HEALEY V. DOLSON ET AL.

Promissory notes—Collateral security—Agreement—Principal and surety—Giving time on principal debt—Payment.

On the 29th August, 1877, defendant R. made a note of that date for \$700, at eighteen months, in favour of D., and for his accommodation, which R. gave to D. without any restriction as to its use. D. endorsed the same and handed it to the plaintiff; and at the same time gave the plaintiff his, D.'s, own note of the same date at three months, taking from plaintiff the following receipt: "Received from R. a note endorsed by D., payable eighteen months after date, for \$700, which note is given me only as collateral security for the payment of certain note endorsed by me for D.; and when said note is fully paid, I agree to return same." On the 24th September, a statement of account took place between the plaintiff and D., when D. took up the note of the 29th of August, by giving plaintiff another note for the like amount at three months.

Held., Rosk, J., dissenting, that the true construction of the agreement was, that D. should have eighteen months, or so much thereof as the plaintiff choose to give him, in which to pay off the \$700; and that D.'s note might be renewed from time to time, so long as payment was not extended beyond the eighteen months; and that under the circumstances the note of the 24th September could not be deemed to have been taken as a payment of the note of 29th of August.

Devaney v. Brownlee, 8 A. R. 355, distinguished.

Per Rose, J.—The effect of the agreement was, that the note was given as collateral security for the payment within the time limited by D.'s note, namely, three months; and the fact that R. had eighteen months to make payment, could make no difference; and, that, apart from the question whether the transaction of the 24th of September constituted a payment or not, it operated as a suspension of R.'s rights, whereby she was discharged.

THIS was an action brought on a promissory note made by the defendant Eliza Robinson, dated 29th August, 1877, for the sum of \$700, payable eighteen months after date, to the order of the defendant, Samuel G. Dolson, and endorsed by him.

The statement of defence of Mrs. Robinson was: 1. That the note was not stamped.

2. That the note was made for the accommodation of Dolson, and was endorsed by him and delivered to the plaintiff as collateral security for the payment of a certain other promissory note for the same amount made by Dolson and endorsed by the plaintiff; and that the said last

mentioned note was, before the maturity thereof, fully paid and satisfied by Dolson to the plaintiff.

3. That the defendant Dolson made several payments to the plaintiff; and that on the 24th of September, 1877, a new accounting took place between them, and that the note for which the note sued on was collateral security was included in said accounting, and without the knowledge and consent of the defendant a new note was given by the said Dolson to the plaintiff, dated the 24th of September, 1877, and that time was extended to the said Dolson without the knowledge or consent of the defendant; and that no notice was given to her that the said note was not paid or satisfied.

There were several other grounds of defence stated, but it is unnecessary to set them out.

The defendant Dolson in his statement of defence set up: 1. That the note was not duly stamped.

2. That the note sued on was collateral security only for a note of the same amount, which before the maturity thereof was fully paid and satisfied.

3. The same allegations as set up by his co-defendant.

4. Claiming credit for certain payments made on account.

Lastly, that the note or notes for which the note now sued on was collateral security, were barred by the Statute of Limitations.

The cause was tried before his Honour Judge Senkler, sitting for Armour, J., without a jury, at St. Catharines, at the Fall Assizes of 1884.

The note sued on was made by the defendant Mrs. Robinson for the accommodation of the defendant Dolson, who is her son. Dolson took the note to the plaintiff, who had been endorsing notes for Dolson's accommodation, and gave it to him, and at the same time gave the plaintiff another note for \$700, dated the same day, 29th August, 1877, at three months, made by the defendant Dolson in favor of the plaintiff, and took from him a receipt in the following words:

ST. CATHARINES, August 29th, 1877.

Received from Mrs. Eliza Robinson, her note, endorsed by S. G. Dolson, payable eighteen months after date, for the sum of seven hundred dollars, which note is given me only as collateral security for the payment of certain note endorsed by me for Samuel G. Dolson; and when said note is fully paid I agree to return the same.

(Signed), T. HEALEY.

For the purpose of this report it is considered unnecessary to set out the additional facts more in detail than they are set out in the judgments.

The learned County Judge upon the evidence found against the defence set up of want of stamps.

Upon the other questions he was of opinion on the evidence that it was not shewn the note of the 24th of September was taken as payment of the note of the 29th August, or that it had such effect in law.

He then proceeded as follows :

"Then is the fair meaning of the agreement contained in Healey's receipt, that Mrs. Robinson's note was only to be security for Dolson's note of same date, and not for the debt or sum of money for which it was given or for any renewal of that note.

"Two points strike one forcibly in reading the receipt : first, that Mrs. Robinson's note was at eighteen months, while Dolson's note given to Healey to discount was at three months ; and secondly, that the object for which the security was given was the payment of a note endorsed by Healey for Dolson. It is not a debt due by Dolson to Healey, but the use of Healey's name for Dolson's benefit.

"Now if the contention of the defendants be correct, in the event of Dolson failing to pay the note at maturity, Healey must pay it, and if he could not recover the amount from Dolson, must wait fifteen months before he could realize on his security from Mrs. Robinson. I presume such arrangement as this could be made, and, if it was clearly expressed, might be enforced ; but it seems to me a very unusual and not a very reasonable one, and one not to be presumed unless the language of the agreement clearly expresses it.

"It seems to me a reasonable construction of the agreement that it was entered into with the view that Dolson should have the eighteen months, or so much of that time as Healey chose to give him, in which to pay off the \$700; and that the note might be renewed from time to time if Dolson and Healey chose to do so, so that the payment was not extended beyond the eighteen months. In this way the nature of the dealing between Healey and Dolson would be the same, and Healey would remain an endorser for Dolson, which is the liability secured.

"According to the other contention his position would become that of a creditor, a position he would hold for fifteen months before proceeding against the surety; but, even if the security was intended to apply only to the August note, would the taking of the new note (at the request of Dolson and simply to give him a little more time) in any way prejudice Mrs. Robinson and discharge her from liability? No doubt if her note and the first note given by Dolson had the same time to run, an extension of time would release the surety, if given without her consent, for the well understood reason that she would be unable when she paid her own note to take up Dolson's note and proceed upon it at once. The extension given would afford her a defence.

"In the present case her note did not fall due for many months after the expiration of the extension to Dolson, and had she the right to insist on paying her note until it fell due. I do not see on what principle she could do so; her contract was to pay at the end of eighteen months; why should the holder of the note be bound to take the money before? I do not think he was under any legal obligation to do so, and, unless he was so, the surety cannot say her right has been infringed upon. It was her own doing that she postponed the time of payment of her note for eighteen months, and if it should turn out in any way against her interest it is her own fault.

"It occurred to me while considering whether the note of the 24th September should be considered a payment of the

note of 29th August, that the fact that the latter was not due when the former was taken for it, might make some difference. I was not referred to any authority on this point, and I have not been able to find any. Healey said he would have given Dolson the first note had he asked for it, but Dolson did not do so, and Healey still holds both notes.

"I do not think the giving up the first note would have necessarily made the second a payment of the first : *Daniel* on Negotiable Instruments, 3rd ed., sec. 1266 (a), especially when the effect of holding that it was a payment would be to deprive the holder of the note of a security for the debt, as the intention to receive the second as a discharge would be thereby rebutted : *Daniel* on Negotiable Instruments, sec. 1266 (b).

"I am therefore of opinion that the plaintiff is entitled to recover."

The learned Judge therefore entered judgment in favour of the plaintiff against both defendants.

At the last Michaelmas Sittings, *Aylesworth* moved on notice to set aside the judgment against both defendants, if not as against both defendants, then as against the defendant Eliza Robinson.

During the same Sittings, November 29, 1884, *Aylesworth* supported the motion.

McClive, contra.

The following cases were referred to : *Waterous v. Montgomery*, 36 U. C. R. 1 ; *Devanney v. Brownlee*, 8 A. R. 355 ; *Daniel* on Neg. Insts., 3rd, ed., secs. 1312-15, 1317 b, 1319, 1332 a, 1337 ; *Laxton v. Pratt*, 2 Camp. 185 ; *Pooley v. Harradine*, 7 E. & B. 431 ; *Hooker v. Gamble*, 12 C. P. 512 ; *Shaver v. Allison*, 11 Gr. 355 ; *Bailey v. Griffiths*, 40 U. C. R. 418 ; *Shepley v. Hurd*, 3 A. R. 549 ; *Croydon Commercial Gas Co. v. Dickinson*, 1 C. P. D. 707, 2 C. P. D. 46 ; *Austin v. Gibson*, 4 A. R. 316 ; *Canadian Bank of Commerce v. Woodward*, 8 A. R. 347 ; *Canadian Bank of Commerce v. Green*, 45 U. C. R. 81.

January 3, 1885. GALT, J.—The learned Judge has made such a full and clear statement of the facts of this case, it would be a waste of time to repeat them.

There are two grounds of defence. The first as to want of stamps, and the second as to giving time to the defendant Dolson without the knowledge and consent of Mrs. Robinson.

As regards the former. Mr. Aylesworth, in his well considered argument, simply gave the Court to understand that he relied on it as a defence.

I agree with the opinion expressed by the learned Judge that the defendants cannot avail themselves of this defence. It is plain that no intention existed on the part of the plaintiff to evade the stamp duty, and as soon as his attention was called to what at most was a simple omission, he placed double stamps on the note.

There was one case cited by Mr. Aylesworth, which in some respects is very similar to the present, namely *Devaney v. Brownlee*, 8 A. R. 355. The head note does not correctly state the case, the note made by the female defendant never having been renewed. The facts were, the female defendant gave her son, the co-defendant, a note for \$1200, payable at three months, to be used as he liked. This note was delivered by the son, without the knowledge of his mother, to the plaintiff, to be held by him as a collateral security for the payment of another note, made by the plaintiff for the accommodation of the son, payable at three months. The note for which this note was collateral was reduced by payments to \$400, and had been renewed several times without the knowledge or consent of the mother. The said sum not having been paid by the son was paid by the plaintiff, and the action was brought. The ground of defence relied on was the same as in the present case, namely, that defendant was only a surety, and that time was given to the principal debtor without her consent, and she was discharged. This defence was upheld by the Court of Appeal, and would of course be conclusive if the facts were the same, but they are not.

The learned Chief Justice, giving judgment, says, at p. 365: "Everything turns upon the extent of the authority given by the mother to the son when she signed the note. If the transaction had occurred between persons conversant with business, for instance, a man of fair education and business habits putting his name to a note in blank, or filled up for the accommodation of his friend, and telling him he might use it as he liked, I apprehend that no more would be meant or understood between them than that the friend might raise money upon it, or use it as security, not that he might agree to keep it afloat *after its maturity* for an indefinite period, without his consent or knowledge using it for a purpose outside of its character as a promissory note. And if such would be the interpretation put upon what might pass between such persons, I see no reason for interpreting differently what passed between Elizabeth Brownlee and her son."

In the case we are now considering, the plaintiff had, from time to time, endorsed notes for the accommodation of the defendant Dolson, and had also advanced money on his account. He states in his evidence, which is not contradicted: "On the 29th August, 1877, I got a note from Dolson without Mrs. Robinson's name. It was given me to enable me to raise the \$700 I had paid out. This note was at three months. I think this note was taken up and another note for \$700 of Dolson's, dated 24th September, 1877, substituted for it. This was discounted, so was the other, dated 29th August, 1877. The note of 29th August was taken out of the bank when the new note of 24th September was given. I think I had a settlement with Dolson between the dates of the two notes. The note sued on was never paid."

At the time when the plaintiff endorsed the note of 29th August, 1877, the note now sued on was handed to him by Dolson, and he gave the following receipt, which was drawn up by Dolson: "Received from Mrs. Eliza Robinson her note endorsed by S. G. Dolson, payable eighteen months after date, for the sum of seven hundred dollars, which

note is given me only as collateral security for the payment of certain note endorsed by me for Samuel G. Dolson ; and when said note is fully paid I agree to return the same."

The question now before us turns entirely on the true construction of this receipt. There can be no doubt as to the position of the defendant Eliza Robinson. Her note at eighteen months was given expressly as collateral security for a note payable at three months, and was to be returned to her when the note was fully paid. It is this circumstance that distinguishes it from the case of *Devanney v. Brownlee*. The terms of the receipt are: "When said note is fully paid I agree to return the same," meaning not the note given by Dolson, but the note given by Mrs. Robinson.

It was urged by Mr. Aylesworth that the fact that there was a settlement between Dolson and the plaintiff at the time when the note of the 24th September was taken, it must be held that the original note was paid and satisfied.

We find on turning to the settlement that the so-called settlement was simply a statement of account between them, shewing a balance in favour of the plaintiff of \$42.

The learned Judge has considered that point very fully in his judgment, and I agree with him, that the true construction to be placed upon the so-called receipt is that the intention was that Dolson might have eighteen months to settle the debt for which his own note was given, if the plaintiff was willing to accommodate him. When we consider that the receipt was drawn by Dolson himself, we can hardly believe the intention of the parties to have been that no renewal of the note secured was to be granted, under the penalty of losing the security.

In *Daniel* on Negotiable Instruments, 3rd ed., secs. 1266, 1267, it is laid down, and numerous authorities are cited in support of the doctrine, that the question of whether a renewal note is taken in satisfaction or not, is one of intention, and it is manifest that in what took place between Dolson and the plaintiff, the latter never could have

intended the effect of the note of the 24th of September as shewing that the note of 29th August was fully paid.

It may be argued that Mrs. Robinson is not bound by the terms of the receipt drawn by Dolson, and that she is entitled to contend that her position as a surety cannot be affected by what Dolson did; but it is manifest that whatever he did he did as her agent. She gave the note to him; "he did not say what he wanted it for." As far as she was concerned it was an absolute gift to him, and it was his act that pledged it as collateral security for the payment in full of his own note. He then gave it to the plaintiff to be held as collateral security for the payment of certain note endorsed by the plaintiff for him, and as in my opinion such note has not been paid, this motion must be dismissed.

CAMERON, C. J.—I concur in the opinion of my learned brother Galt. The surety, Mrs. Robinson, by giving her note to her son payable eighteen months after date without restriction as to its use, authorized him thereby to pledge her credit for that period of time, and the power of so pledging it was not limited by the first transaction to the three months' note. Unless the circumstances were such as to constitute a defence for the son, the endorser, I do not see that there is any evidence of a dealing between the principals than can be said to prejudice the surety, or that may possibly prejudice her in her rights either against the plaintiff or her own principal. She is not made liable to any greater extent than she knowingly intended to be either in respect to amount or time of payment. There was no arrangement between her and the plaintiff in respect of his dealings with her son, and so there was no contract of suretyship made by her other than the contract disclosed by the note itself, in respect to which persons dealing with her son and ignorant of the fact she was only a surety, she would be a principal and not a surety. But there is no doubt, as far as the plaintiff is concerned, she is entitled to all the rights or equities that attach to

the position of surety, and the question is, what is the equity attaching to the present transaction that relieves her from the obligation her written contract shews she has assumed?

It is contended that although the obligation she entered into was to pay her son or his order, that is to any person by her son's endorsement becoming the holder of the note, the amount thereof in eighteen months, yet although she knew nothing about it, she was relieved from any obligation to this plaintiff as the holder, at the end of about three weeks after he took it, because her son pledged it as collateral security for a note which he gave to the plaintiff payable in three months, but which he took up at the end of three weeks by another note, given on a new settlement of accounts for a like amount, and extended the time for the period of three months from that time.

If this contention be well founded it seems to me the son is equally relieved, because the purpose for which the note was given to the plaintiff has been fully answered.

But this contention is not, in my opinion, entitled to prevail. Although it is not clearly brought out in the evidence, it must have been the intention of the parties, I mean of the son and the plaintiff, from what is made to appear, that the collateral obligation of the mother was continued for the new note. The language in the receipt, that when "the note was fully paid"—that is the son's note for \$700—plaintiff would return the note in question, would rather indicate they meant not when the note was renewed, but when it was actually paid; that is, treating the note as a debt, the collateral liability should continue for the full period named in the note sued on, and not be affected by any extensions of time within that period.

The case is easily distinguishable from that of *Devanney v. Brownlee*, 8 A. R. 355, as in that case the surety only assumed a liability of three months and there was nothing to shew that she had in any way authorized her son as her agent to pledge her credit beyond that time, and so the principal, who extended the time under the

ordinary rule of equity, without her consent, lost recourse against her.

In the present case there was no contract of suretyship, so to speak, between the plaintiff and Mrs. Robinson at all, but her son, having a note of hers payable in eighteen months, pledges it as collateral security for a note of his own, under circumstances which give to her the equities of a surety as against the plaintiff as far as liability on the note is concerned, but do not limit that liability to the first period for which her son pledged it as collateral; and the receipt, which truly states the collateral character of the holding of the note by the plaintiff, does not profess to be an undertaking with the plaintiff to treat the note as not within the control of the son to be used for a like purpose from time to time within the period of eighteen months.

The fact that a note is an accommodation note does not disentitle a person who, with the knowledge of the fact, takes it, and gives consideration for it, recovering upon it. Therefore, in the present case, it would have to appear that the defendant Mrs. Robinson herself pledged the note to the plaintiff for three months only, or only authorized her son to the knowledge of plaintiff to do so; in which case I presume the fact that the note was payable at eighteen months would not prevent her setting up that it was pledged merely for three months, and the holder having enlarged the time for valuable consideration for the payment of the debt for which it was so pledged would release the surety. But that is not this case.

Mrs. Robinson, in her evidence, says: "I signed a note, and gave it to my son; it was for about \$700; he did not say what he wanted it for."

It cannot be said that in the face of this evidence the receipt is to be accepted as conclusive evidence that this note was authorized to be pledged for three months only, and that the son was not to reissue it, but return it to her at the end of that time. I cannot, therefore, say the learned Judge at the trial came to a wrong conclusion, and

so concur in the opinion of my learned brother Galt, that the motion must be dismissed, with costs on all the grounds of exception taken to the plaintiff's right of recovery.

ROSE, J.—The evidence of the contract between the parties is to be found in the note for \$700, made by the defendant Robinson, dated 29th August, 1877, payable to the order of the defendant Dolson, her son, and by him endorsed to the plaintiff.

2. The note of even date and amount, made by the defendant Dolson to the order of the plaintiff, payable three months after date.

The receipt, also of the same date, signed by the plaintiff, acknowledging the receipt of the eighteen months' note from the defendant Robinson, and stating that it was given to him "only as collateral security for the payment of certain note endorsed by" him "for Samuel G. Dolson, and when said note," i. e., Samuel G. Dolson's note, "is fully paid I agree to return the same," i. e., the note made by Mrs. Robinson.

We have no evidence of what took place at the time of the delivery of the notes other than what we learn from the documents, even if other evidence could be received. I look at the matter as if Mrs. Robinson had herself handed the notes to the plaintiff, and had received the receipt.

Then what is the contract to be read from this evidence? In my opinion it is this: "I, Eliza Robinson, hereby hand you a note made by my son, payable three months after date, and to secure you the payment of the amount thereof I also hand you my own note as collateral security for its payment. If he does not pay his note at maturity, then I will pay it, but not until eighteen months have expired." The contract then would be to pay the \$700 in eighteen months if her son did not pay it in three.

It is clear that as between Healey and Dolson the note is evidence which cannot be contradicted by parol, that the

\$700 were payable at the end of the three months, and that there was no parol agreement in any wise preventing its collection at such date. See *Porteous v. Muir*, 8 O. R. 127, a judgment of this Division during the present sittings, where the leading cases are referred to.

In other words, the only contract for the payment of the \$700 as between Healey and Dolson, of which we have any evidence, is a contract to pay the \$700 at the expiry of the three months from the 29th of August, 1877, and whether the note of Mrs. Robinson be security for payment of the debt or the note, is, in that view, immaterial. She was surety for the payment of \$700 within three months. That she stipulated for eighteen months time within which to make the payment cannot, in my opinion, make any difference. The receipt, however, says she was surety for payment of the note.

I do not stop to enquire whether the note was paid by the transaction of the 24th of September, 1877. If that question, in my opinion, were material I should desire further to consider it.

I proceed to consider whether the taking of the new note for \$700 on the 24th of September, operated as a suspension of the plaintiff's right to sue Dolson, and, if so, whether Mrs. Robinson was thereby discharged.

That it did operate to suspend the remedy will, I think, be admitted to be so clear a proposition of law as not to require the citation of authority to support it. If so, did it discharge Mrs. Robinson?

The principles upon which the Courts act to relieve a surety in such a case "do not depend on any contract with the creditor, but on its being inequitable in him knowingly to prejudice the rights of the surety against the principal;" see *Pooley v. Harradine*, 7 E. & B. 431, 441, and *Oakeley v. Pasheller*, 10 Bligh N. R. 548.

It is clear, as I have stated, that the plaintiff could have sued Dolson at the expiry of the three months for which the first note was given, had the second note not been accepted; and it is equally clear that having accepted

the second note such right of action was suspended until the second note matured.

It is also clear that but for the taking of the second note Mrs. Robinson could, at the expiry of the three months, given by the first note, have paid the plaintiff the amount thereof, and either have required the plaintiff to sue Dolson to enforce its payment, or to transfer it to her, when she could have brought the action in her own name.

This she could not have done after the taking of the second note; and for such reason I am of the opinion the plaintiff cannot now recover against her.

The case of *Devanney v. Brownlee*, 8 A. R. 355, but for the giving of the note at eighteen months, instead of at three months, would admittedly be undistinguishable.

For the reasons I have given I think this does not distinguish it, and that it governs this case.

In my opinion the motion should be allowed to the extent of entering judgment for defendant Robinson, with costs, and dismissed as to Dolson, without costs.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

TEMPLE V. THE TORONTO STOCK EXCHANGE.

Corporation—Member becoming insolvent or bankrupt—Meaning of—Removal of member's name from list—Legality of—Ballot—Two-thirds majority—Interest of complainants.

The defendants' act of incorporation provided for the appointment of a committee of management to manage the affairs, &c., of the corporation, and, under a by-law, the committee were to consider and report on all offences under the by-laws, if submitted to them, and to call a special meeting of the corporation to pass judgment thereon. Power was also given by the Act of incorporation to expel members as by the by-laws should be determined. By by-law 13 all complaints to the committee or corporation were to be in writing. By by-law 21 any member complained against, might have a hearing before the corporation, and if the complaint be proved, a vote should be taken by ballot—by a two-thirds majority of those present and voting being required—first, for the forfeiture of the seat, and then if lost for suspension. By by-law 24 a member becoming bankrupt or insolvent, should not be entitled to take his seat as a member of the corporation, or be present at any meeting thereof; and such seat should revert to the corporation to be sold by them, if the member be not re-admitted within six months from the date of insolvency, and the proceeds applied as directed therein. In November, 1883, without any complaint in writing or notice to the plaintiff or hearing before the corporation, but on the chairman and secretary, whom the committee had instructed to make enquiries, reporting that plaintiff was offering to compromise with his creditors, the secretary, by order of the committee, wrote to plaintiff, calling his attention to by-law 24; and on the same day the list of members was altered by striking out the plaintiff's name. Nothing further was done until March following, when in consequence of a correspondence between the plaintiff's solicitors and the defendants, those members who had previously reported on plaintiff's condition, made a written complaint to the president complaining of the plaintiff having been insolvent in October and November, and of his disqualification thereby under by-law 24, and asking for an investigation by the corporation, which was had, and by an open vote of 15 to 6, the complaint was held to be proved, the two complainants voting with the majority. No steps were taken to declare the seat forfeited or for suspension.

Held, that insolvency under by-law 24, did not refer a condition of insolvency, but to a definite act of insolvency under a bankrupt or insolvent Act, e. g., by an assignment or the issue of a writ of attachment; and therefore plaintiff did not come within its terms; but apart from this the defendants proceedings were clearly illegal and void, for in November there was no complaint that gave the committee jurisdiction to interfere; and as the defendants' affairs were to be managed by the committee, they were responsible for the committee's acts; while the complaint made in March was not a *bona fide* one, but merely an attempt to support the previous illegal act; and also the vote should have been by ballot.

Held, also, that though defendants' proceedings were abortive to deprive plaintiff of his seat, the erasure of his name was an act most detrimental to the plaintiff, as it prevented him from carrying on his business as a broker; and he was therefore entitled to recover damages for the loss he had sustained thereby,

Remarks as to the impropriety of the two complainants acting as Judges on their own complaint; and if deemed present there would not be the requisite two-thirds majority, but otherwise if deemed neither present nor voting.

Per Rose, J.—In the absence of a by law providing for ascertaining the fact of insolvency, the finding of the jury herein that plaintiff was not insolvent was conclusive.

THIS case was tried before Cameron, C. J., and a jury, at Toronto, at the Fall Assizes of 1884.

The statement of claim set out that the plaintiff was a member of the corporation of the Toronto Stock Exchange, the defendants, who were incorporated under an Act of the Provincial Legislature, passed in 1878, and after reciting certain advantages attaching to said membership, complained that the committee of management of the corporation on or about the 21st November, 1883, maliciously, and without complying with any of the provisions of the by-laws in that behalf, reported that the plaintiff was disqualified from taking his seat as a member of the said Stock Exchange, and was not entitled to the benefits accruing to him as a member: that the said committee, although often requested so to do, refused to rescind their said report, or to recognize the plaintiff as a member; and that the said committee on 7th April, 1884, further reported to the members of the said corporation wrongfully and maliciously, and without any foundation therefor, that the plaintiff was an insolvent or bankrupt, and had so continued from the month of October, 1883, and was not at the said last date or subsequently entitled to take his seat as a member of the Toronto Stock Exchange, or to be present at any meeting of the board, and thereupon the said corporation wrongfully and maliciously excluded, without any warrant or authority therefor, the said plaintiff from his membership in the Exchange, and from the privileges pertaining to him as such member, and declared him not entitled thereto.

There were other grounds of complaint set out in the statement of claim, but the foregoing are sufficient for the purpose of ascertaining the position of the plaintiff, and shewing his ground of complaint.

The statement of defence set out several by-laws of the corporation, to which reference is made in the judgments, and further set out that at a meeting of the committee of management held on the 21st day of November, 1883, it having been stated that it was commonly reported outside that some members of the board were not meeting their obligations, it was ordered that the chairman and secretary be appointed a committee to enquire into the matter and report thereon. And that at a meeting of the committee of management held on the 22nd November, 1883, the chairman and secretary reported that the result of their enquiries was, that Messrs. R. H. Temple & Co., (the plaintiff) were offering to settle their liabilities at 20 cents in the dollar, and it was therefore ordered that the secretary write to Mr. Temple calling attention to by-law No. 24 and that on the said 22nd November, 1883, the secretary addressed and sent to the plaintiff a letter as follows : "I am instructed by the committee of management to ask your attention to by-law No. 24, under which you are disqualified from taking your seat at the board." That the plaintiff received the said letter but did not reply thereto, nor take any step or proceeding to call in question the statement therein contained, nor did he thereafter attend the meetings of or take his seat at the said board, but on the contrary he appeared to agree to and acquiesce in the correctness of the intimation conveyed in the said letter, until on or about the 5th day of March, 1884, when a letter from a firm of solicitors was received stating their opinion that the plaintiff had been illegally suspended from the Stock Exchange: that on 11th March, 1884, a complaint was duly made by members of the corporation that the plaintiff had in the months of October and November, 1883, become insolvent or bankrupt, within the meaning of said by-law 24, and did when he was so insolvent or bankrupt, take his seat as a member of the corporation, and was present at the meetings of the board in contravention of by-law 24, and thereupon the said committee of management under and by virtue of their power

and authority in that behalf contained in the by-laws of the defendants after due notice to and in the presence of the plaintiff duly considered and reported on the said offence of the plaintiff as submitted to them. The report of the committee was as follows :

1. That in October or November last Mr. R. H. Temple was insolvent and bankrupt within the meaning of by-law 24.

By-law 24 is as follows, so far as is necessary to be at present considered.

"By-law 24, sec. 1. A member of the corporation becoming insolvent or bankrupt, or becoming a defaulter within the meaning of by-law No. 19, or having been convicted of any criminal offence, shall not be entitled to take his seat as a member of the corporation, or be present at any meeting of the board. Sec. 2. He shall not have a right to dispose of the said seat, but the said seat shall revert to the control of the corporation, to be dealt with as hereinafter provided."

2. That while insolvent or bankrupt, in October or November last, within the meaning of the by-law 24, Mr. R. H. Temple did take his seat as a member of the Toronto Stock Exchange, and was present at meetings of the board, in contravention of the said by-law.

3. That Mr. R. H. Temple has not been since October last, and is not now, entitled to take his seat as a member of the Toronto Stock Exchange, or to be present at any meeting of the board.

The statement of defence then alleged that the corporation, after due notice to the plaintiff, adopted the said report, and found the complaint proved, as stated in said report.

The defendants denied all malice, and claimed the benefit and protection of their by-laws, and of all the other powers and authorities vested in them in regard to members and membership.

At the trial, several objections were urged by the learned counsel for the defendants, which were afterwards brought

forward on the argument of this rule, and no witnesses were called for the defence.

The questions submitted to the jury had reference to the solvency of the plaintiff.

The verdict was as follows :

1. We find that the plaintiff was solvent at the time he was deprived of his seat, in November, 1883.
2. That he was improperly deprived of his seat at the said Exchange ; and damages were assessed at \$2,000.

At the last Michaelmas sittings, the case came before the Court on a order *nisi* against the findings of the jury, and on notice of motion against the ruling of the learned Judge at the trial.

The order *nisi* and notice of motion were the same, calling on the plaintiff to shew cause "why the verdict of the jury and the judgment pronounced in favour of the plaintiff should not be set aside, and judgment entered for the defendants, on the grounds, that the questions submitted to the jury were immaterial : that it should not have been left to the jury to find whether or not the plaintiff was, as a fact insolvent or bankrupt, within the meaning of the by-laws of the defendants' corporation : that the question of whether or not the plaintiff was an insolvent or bankrupt was one solely for the defendants' corporation to find upon and determine : that the defendants' corporation having, in accordance with their rules determined the question, the same was not open to review in any other tribunal ; and on the ground of misdirection and want of proper direction on the part of the learned Judge who tried the cause, in ruling and telling the jury that the proper forms had not been adopted to entitle the defendants to exclude the plaintiff; and why upon the whole case and the law and evidence, the said verdict and judgment should not be set aside and judgment entered for the defendants; or why the findings of the jury should not be set aside and judgment entered for the defendants.

During the same sittings *S. H. Blake, Q.C., and Moss, Q.C.*, supported the order and motion. [McCarthy, Q. C., took a preliminary objection that the grounds of objection to the findings of the jury should have been stated in the order *nisi.*] [CAMERON, C. J.—We think the order *nisi* is sufficient.] Under by-law 24 a member becoming bankrupt or insolvent is disentitled from taking his seat as a member, or to be present at any meeting of the board. The plaintiff was clearly insolvent within the meaning of the by-law. The by-law points to a condition of insolvency, that is, to an inability to pay debts in the ordinary course of business as they mature, and become due and payable, and not to an act of insolvency within the meaning of a bankrupt or insolvent law. This is quite evident, for when these by-laws were passed there was no bankrupt or insolvent Act in force. The true test is, whether a member is able to meet all demands when made on him, and it is no answer that he has property which, if realized, would be sufficient to meet the claims against him, but which he was not then able to realize : *Meriden Silver Co. v. Lee* 2 O. R. 451, 454; *Herssee v. White*, 29 U. C. R. 232; *Bump on Bankruptcy*, 10th ed., pp. 37, 412; *Beer v. Foakes*, 11 Q. B. D. 221, 9 App. Cas. 605; *Clarke on Insolvency*, pp. 27, 28. Insolvency put an end to the plaintiff's status as a member, and all the board had to do was to find insolvency as a matter of fact. The decision of the question was a matter entirely in the discretion of the board, and in the absence of *mala fide*, the decision cannot be interfered with. There is no pretence of want of *bona fides*. The board in coming to a conclusion are not bound by strict rules of law. *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; *Dawkins v. Antrobus*, 17 Ch. D. 615; *Essery v. Court Pride*, 2 O. R. 596; *Field v. Court Hope of the Ancient Order of Foresters*, 26 Gr. 467; *Cuthbert v. Commercial Travellers' Association*, 39 U. C. R. 578; *Cannon v. Toronto Corn Exchange*, 27 Gr. 23. *Inderwick v. Snell*, 2 McN. & G. 216; *Regina v. Darlington Free Grammar School*, 12 L. J. N. S. Q. B. 124, in appeal 14 L. J. N. S. Q. B. 67, 6 Q. B. 682; *Gardner v.*

Freemantle, 19 W. R. 256; *Lyttleton v. Blackburn*, 33 L. T. N. S. 641.

McCarthy, Q.C., and *Nesbitt*, contra. In proceeding with the argument they stated that they did not waive their preliminary objection. What took place here was an attempt to disfranchise the plaintiff. A different rule applies with reference to expulsion of a member from a club or society, and disfranchisement from a corporation; and therefore the cases referred to by the other side as to the discretionary powers of clubs and societies do not apply. There must be express authority given to disfranchise. Having regard to the by-laws and the law of the land, there was no power in the board to disfranchise the plaintiff. By-law 24 only states that insolvency, &c., prevents the member taking his seat, but he still continues a member, and the defendants admit this: *Angell and Ames on Corporations*, 11th ed., secs. 409-10; *Baggs's Case*, 11 Co. 99; *Marsh v. Huron College*, 27 Gr. 605. Disfranchisement could only be by some proceeding taken in a Court of law, which has not been done here. There is no power in the board to deal with insolvency. There should first have been a finding of the jury that the plaintiff was insolvent. There was no insolvency here. Insolvency under by-law 24 means not a condition of insolvency that is not a general inability to pay, but a definite act of insolvency under some bankrupt or insolvent law, that is by an assignment to an assignee or by the issuing of a writ of attachment: *DeLastet v. LeTavernier*, 1 Keen 161. The meaning of the by-law is that when in this way the fact of insolvency has become open and notorious the board can act upon it. The action of the defendants was, in any event, illegal. Nothing that took place in November could deprive the plaintiff of his seat. There should have been notice to the plaintiff and a hearing before the board. The subsequent acts of the board in March were not for the purpose of a *bona fide* investigation, but merely an attempt to make legal what before was clearly illegal. There was no valid hearing before the board. The two complainants Stark

and Hime also acted in hearing the complaint. They were thus both complainants and Judges. They could not fill both positions ; and this of itself would render the decision of the board illegal. They also referred to *Fisher v. Keane*, 11 Ch. D. 35 ; *Labouchere v. Wharncliffe*, 13 Ch. D. 346 ; *Burton on Insolvency*, 114; *Cannon v. Toronto Corn Exchange*, 27 Gr. 20 ; *Dos Passos on Stockholders*, p. 56.

S. H. Blake, Q. C., in reply. As to the alleged meaning of the by-law 24 as respects insolvency, the persons who drew the by-law are the best judges of its meaning, namely, an insolvent condition, and the plaintiff himself so understood the by-law, and after being notified of the action of the committee in November he did not attempt to take his seat. There is no difference between a club and corporation. The plaintiffs argument in this respect is fully answered by the case of *Field v. Court Hope of the Ancient Order of Foresters*, 16 Gr. 467, and other cases before referred to. See also *Foss v. Harbottle*, 2 Hare 461 ; *Mozley v. Alston*, 1 Phill. 790.

January 3, 1885. GALT, J.—The objections taken to the verdict are of a two-fold character, the first based on the evidence given at the trial ; and the second on the constitution and by-laws of the corporation which are strictly binding on the plaintiff he being a member thereof.

As respects the former. The only oral testimony was that of the plaintiff and of the assistant secretary. I need not refer to the latter at present, as it has no bearing on the question I am about to consider, namely, the solvency of the plaintiff on the 22nd November, 1883, and on 7th April, 1884. The jury have found expressly, that "the plaintiff was solvent at the time he was deprived of his seat in November, 1883, and that he was improperly deprived of his seat at the said Exchange." This was a question of fact, and the verdict of the jury cannot be interfered with by us unless we are satisfied that it was one not supported by the evidence, and was such as no reasonable men should have given.

It was proved by the plaintiff himself that in February, 1882, he, being then a partner with one Hope, became insolvent, and made an arrangement with his creditors by which they arranged to pay fifteen cents in the dollar, payable over three years, amounting in all to about \$14,000. The plaintiff at this time ceased to take his seat at the board under by-law 24, but having made this settlement with his creditors he was re-admitted in July, and transacted business until November, 1883, when he received the letter set out in the statement of defence.

It was stated by the plaintiff that the defendants were aware of the position of the plaintiff when he was re-admitted, namely, that he had made a composition with his creditors, payable over a period of three years, consequently the circumstance that at that time he was unable to pay his debts in full on demand could not be considered as placing him in a state of insolvency within the meaning of by-law 24. Was there then anything to shew that he had altered his standing in November, 1883, when he was treated as an insolvent. Judging from the evidence he was actually in a better condition financially in November, 1883, than he was in July, 1882. At the latter date he and his late partner Mr. Hope, who had also been re-admitted, were in debt \$14,000, against which they had an equitable interest in some house property amounting to about \$6000, whereas, according to his evidence, they had reduced the \$14,000 by about \$3,000, and the house property remained unsold. The plaintiff swears positively he was not insolvent, and the jury have accepted his statement, how can we under such circumstances say that there was no evidence to sustain their finding?

It is to be observed that nothing was done by the board nor by the committee of management after the letter of the 22nd of November, until the 11th of March, 1884, when the complaint set out in the statement of defence was brought before the board. There was then an enquiry held, but it is manifest from the minutes of the managing committee, to whom the complaint was referred, that they

limited their enquiry to the position of the plaintiff in October or November, 1883, although in their report they say: "That while insolvent or bankrupt in October or November last, within the meaning of by-law 24, R. H. Temple did take his seat as a member of the Toronto Stock Exchange, and was present at meetings of the board in contravention of the said by-law, and that Mr. Temple has not been since October last, and is not now, entitled to take his seat as a member of the Toronto Stock Exchange, or to be present at any meeting of the board."

On referring to the proceedings before the committee we find the only claim against the plaintiff was one for \$1,600 made by a person named Cox. This claim appears by Cox's own admission to have been settled. See exhibit 16, which is dated 7th December, 1883, "As there seems to be some question of your position with our firm, I hand you this letter to say you accepted delivery of all stock from us, and are not indebted to us in any sense whatever, and we have no claim against you."

It is true that by another letter of the same date Mr. Cox reserves a right to claim against the proceeds of the sale of the plaintiff's seat at the board in case it should be sold, but at the time when the examination took place before the committee of management the debt had been cancelled, and the jury have found that the plaintiff was improperly deprived of his seat at the board.

We cannot interfere on this branch of the case.

As respects the second ground of objection, viz: "that the questions submitted to the jury were immaterial: that it should not have been left to the jury to find whether or not the plaintiff was, as a fact, insolvent within the meaning of the defendants' by-laws: that the question whether or not the plaintiff was an insolvent or bankrupt was one solely for the defendants' corporation to pass upon and determine: that the defendant corporation having in accordance with their rules determined the question, the same was not open to review in any other tribunal.

This was very strongly urged by the learned counsel for the defendants, and the following cases were cited and relied on by them: *Hopkinson v. Marquis of Exeter* L.R. 5 Eq. 63; *Dawkins v. Antrobus*, 17 Ch. D. 615; *Field v. Court Hope of Ancient Order of Forresters*, 26 Gr. 467; *Inderwick v. Snell*, 2 McN. & G.; *Regina v. Darlington Free Grammar School* 12 L.J. N.S.Q.B. 124; the same case in Ex. Ch., in Appeal, 14 L.J. N.S.Q.B. 67, 6 Q.B. 682.

By section 5 of the Act of Incorporation, "the said corporation may expel any member for such reasons and in such manner as may be by by-law appointed."

I may here state it does not appear the corporation have actually expelled the plaintiff.

By section 2 the corporation have express power to make and establish such proper by-laws as they may deem expedient and necessary, and to amend and repeal such by-laws, provided such by-laws are not contrary to law.

By section 3. The affairs, business, and concerns of the corporation shall be managed by certain members who shall together constitute the committee of management.

By section 10 of by-law 8, the committee of management shall consider and report upon all offences under the by-laws if submitted to them, and call a special meeting of the corporation at three days' notice to pass judgment on them.

By section 1 of by-law 13, all complaints or any other communications to the corporation or to the board must be in writing, and be signed by the writer, and shall be submitted to the committee of management who shall make their report thereon to the corporation.

By-law 21. Any member against whom a complaint is brought before the committee of management in writing for contravening or refusing to comply with any of these by-laws, may have a hearing before the corporation at a meeting called for that purpose by the committee of management.

By by-law 24. A member of the corporation becoming

insolvent or bankrupt shall not be entitled to take his seat as a member of the corporation, or to be present at any meeting of the board.

The foregoing appear to me to be the sections of the Act and of the by-laws which it is necessary for us to consider in disposing of this branch of the case.

Mr. Ogden, who is assistant secretary, was examined and stated: "I am assistant secretary of the stock exchange. I was present at all the meetings of the board, *not* of the committee of management."

From his evidence, it appears the first complaint made to the board against the plaintiff was on the 11th March, as set forth in the statement of defence, but it was proved that on the 22nd November previous, the following letter, signed by *the secretary of the corporation*, was sent to the plaintiff:

"SIR,—I am instructed by the committee of management to call your attention to by-law 24, under which you are disqualified from taking your seat at the board."

It does not appear that any complaint in writing affecting the solvency of the plaintiff had been made under sec. 1 of by-law 13 to the corporation, nor under by-law 21 to the committee, nor that any enquiry had been instituted nor application made by them to the plaintiff as respects the state of his affairs, but he is condemned at once as having broken by-law 24, and as being, therefore, disqualified. It is not a notice calling his attention to the provisions of by-law 24, whereby, in the event of his becoming insolvent or bankrupt, he shall not be entitled to take his seat, but is an absolute notice to him that he is disqualified. It was proved also that on the same day a list of the members of the stock exchange published by the authority of the corporation was altered by striking out the name of the plaintiff. So everything was done under the authority of the committee of management to deprive the plaintiff of his rights as a member.

It is therefore manifest that the committee of management had acted in a manner not authorized by the by-

laws, and as by the third section of the Act of incorporation the affairs, business, and concerns of the corporation shall be managed by the committee of management, the defendants are responsible for their acts as representing the corporation.

The last point, which was very strongly urged on behalf of the defendants, namely, that the acts of the defendants cannot be questioned in a Court of law, but must be decided by the members themselves, remains to be considered.

The cases of *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63, and of *Dawkins v. Antrobus*, 17 Ch. D. 615, were cases arising from the expulsion of the plaintiffs as members of certain clubs; and it was clearly proved, particularly in the former, that as clubs were formed for social purposes, it was absolutely necessary that the members should be themselves the judges as to the expediency of a member remaining on terms of social intimacy with his companions; and if, in their opinion, a member had been guilty of improper conduct, they were necessarily the proper judges.

The case of *Field v. Court Hope of Ancient Order of Foresters*, 26 Gr. 567, was a case in which, by a positive rule of the society, if a member in the position of the plaintiff refused to deliver up books in his possession, he should be expelled, and the Court upheld the action of the defendants.

The case of *Regina v. Darlington Free Grammar School*, reported in 12 L. J. N.S. Q.B. 124, and afterwards in Appeal, 14 L. J. N. S.Q. B. 67, has no bearing on the point. That was an application for a *mandamus*, calling on the defendants, who were trustees of the school, to re-instate the plaintiff as master, and was refused, on the ground that by the express terms of the original deed the founder had left the power of dismissal to the governors in the exercise of their reasonable and sound discretion.

The case of *Inderwick v. Snell*, 2 McN. & G. 216, arose out of the action of a public meeting of the shareholders

of a trading partnership. By the 27th clause of the deed "An extraordinary general meeting, especially called for the purpose, may remove from his office any director or auditor for negligence, misconduct in office, or any other reasonable cause." The plaintiffs had been removed by the vote of a general meeting specially called, and the Court refused to interfere. In giving judgment the Court say: "This Court might inquire whether the meeting was regularly held, and in cases of fraud clearly proved might perhaps interfere with the acts done."

The defendants in that case were, together with the plaintiffs, members of a trading partnership, and in a previous part of the judgment the Court says, at p. 223: "We cannot take upon ourselves to say that in the case of a trading partnership like this, this Court has upon such a clause in the deed of partnership jurisdiction or authority to determine whether, by the unfounded speech of any supporter of the charge, the shareholders present may not have been misled or unduly influenced."

In the case now under consideration the circumstances are very different. The members of the corporation were united as a corporation for the purpose of enabling each member to carry on his own business more advantageously, and in order to enable them to do so, the corporation was empowered to make and establish such by-laws for its government as they may deem expedient. They have done so, and such by-laws are binding on the corporation and on the members. By one of them, complaints are to be made in writing, and it cannot be doubted the intention was that notice of such complaint should be given to the accused before any action was taken against him. We find this was actually done as soon as a complaint in writing was brought before the board in March, 1884. But in November, 1883, without any complaint in writing, and without any notice to the plaintiff we find that the committee of management notified him that he was disqualifed from taking his seat at the board and erased his name from the published list of members, thus depriving him of his means

of livelihood. It is for the injury thus done the plaintiff brings his action, the board have taken no action towards expelling the plaintiff beyond adopting the report of the committee of management. They have not proceeded to take a vote under sec. 2 of by-law 21 as to the forfeiture of the seat of the plaintiff or for his suspension.

The injury for which the plaintiff is entitled to recover in this action is for what was done by the committee of management by excluding him from his seat and of erasing his name from the list of members having acted in a manner contrary to the provisions of the by-laws of the corporation.

CAMERON, C. J.—I fully concur in the opinion just pronounced by my learned brother Galt. The merits I think are altogether with the plaintiff. Under the circumstances, he was most unfairly dealt with.

I had some doubt, having regard to the decision of *Cuthbert v. Commercial Travellers Association*, 39 U. C. R. 578, whether, the proceedings of the defendants being irregular and abortive to expel the plaintiff from his membership in the corporation, the plaintiff could be said to have suffered any actionable wrong for which he was entitled to be compensated in damages, but further consideration and examination of the authorities, have satisfied my mind that the plaintiff did sustain a pecuniary damage which he had the right to call upon the defendants to make good.

I quite agree in the opinion that he is still a member of the Stock Exchange, and has not been expelled therefrom, but he has been deprived of the rights of membership resulting in pecuniary loss. Removing his name from the share list was a most effectual bar to his carrying on his business. It was an intimation to brokers throughout the Dominion that he was no longer in a position to do business, as none but members of the Exchange can take part in the buying and selling of stocks in the only recognized market where such transactions take place, as far as

the city of Toronto is concerned. There was therefore a complete interruption in the conduct of his business, resulting in a direct loss to him of certainly not less than the jury awarded him, if his own evidence was to be relied on, and there was nothing shewn upon the trial to throw doubt upon this branch of his testimony.

This case differs very widely from *Wood v. Woad*, L. R. 9 Ex. 191, where it was held that an abortive expulsion of the plaintiff from membership in a mutual insurance society did not give a cause for action, no actual damage resulting to the plaintiff therefrom. The benefits that would have accrued to the plaintiff if the alleged attempted expulsion had not been made were not interfered with, and remained to the plaintiff, that is, he continued entitled to the benefit of the insurance he had effected, while here the action of the committee of management of the defendants quite debarred the plaintiff from exercising the rights and privileges of membership, which exercise resulted in gain, profit, and benefit of a direct pecuniary character, and the interruption of the user of such privileges and rights resulted in the loss of those gains, profits, and benefits.

Upon the point of the right of Courts to interfere with the management of the internal affairs of social clubs, societies, or corporations, there would seem to be no such right where the question is one of internal management merely, and where they manage their affairs without irregularity the mere disregard of what the Court may deem the merits will not take the case out of the general rule, provided that, in the case of the removal of a member, he has had the opportunity of being heard.

The defendants are incorporated by an Act of Parliament, giving to them the express powers of expulsion for such reasons and in such manner as they may provide by by-law. Without such power of expulsion I do not think it would be competent for the governing body to remove a member who has acquired a pecuniary and valuable interest in the corporate property.

The defendants have provided by-laws, under which a member may be deprived of his corporate rights.

The first in order is by-law 19, which provides, any member who shall neglect to pay his fees or fines for one month after having been notified by the treasurer, shall be reported by him to the committee of management, who shall immediately call a special meeting of the corporation giving fourteen days' notice of the same, for the purpose of considering his default, when his seat may be declared forfeited.

Then by-law 20 provides, a member who shall have been convicted of any criminal offence may, at a special meeting of the corporation called by the president, at three days' notice, be declared to have forfeited his seat.

By-law 24 declares, a member of the corporation becoming insolvent or bankrupt, or becoming a defaulter within the meaning of by-law 19, or having been convicted of any criminal offence, shall not be entitled to take his seat as a member of the corporation, or be present at any meeting of the board.

By sub-sec. 2 such member shall not have the right to dispose of his seat, which shall revert to the control of the corporation, to be dealt with as thereafter provided ; that is, if he fails to secure re-admission within six months from the date of insolvency or bankruptcy, the committee of management may proceed to sell the seat, and the proceeds shall be applied (under by-law 23) first in payment of all fees, fines, and liabilities to the corporation or any member thereof, *pro rata* as to claims of members, if not sufficient to pay in full ; and if there be any balance (sub-section 24) it shall be handed over to the assignee or legal representative of the member's creditors.

The seat may be forfeited under by-law 39, if a member sues another member in respect of a matter that has been or may be the subject of arbitration under that by-law.

By-law 40 regulates the commissions that may be charged by members, and provides the penalty for infraction of this by-law.

By-law 42 provides for the reporting to the board by any member the name of any one who violates his engagements with such member as a broker, and for registering in a book kept for the purpose the name of every person whom, after due investigation, the committee of management shall determine to be a defaulter, and the name of the broker complaining there to remain until any loss that the broker may have suffered be liquidated, and so long as the name of the defaulter continues registered no member shall execute or cause to be executed any business for him under pain of immediate suspension.

By-law 43 contains the very proper provision, that no fictitious sales or contracts shall be made at the board, and any member contravening this by-law may, upon conviction, be declared to have forfeited his seat, or be suspended, as provided by by-law No. 21.

The manner of making complaints is regulated by by-law 13, which declares: "All complaints or any other communications to the corporation or to the board, must be in writing, and be signed by the writer" (meaning, no doubt, the party complaining) "and shall be submitted to the committee of management, who are to make their report thereon to the corporation, and shall, if required by the corporation, call a special meeting at three days notice, to consider such report."

Then the trial of complaints is provided for under by-law 21, which is as follows:

"Any member against whom a complaint is brought before the committee of management in writing, for contravening or refusing to comply with any of these by-laws may have a hearing before the corporation at a meeting called for that purpose by the committee of management." Sec. 2. If the complaint be proved, a vote shall be taken by ballot, and the seat declared forfeited, or that the member be suspended for not less than three months, or more than two years. Sec. 3. Such ballot shall be taken first for the forfeiture of the seat, when, if lost, it shall be for the suspension for two years, and, if lost, for a shorter period,

and so on, if necessary, till the three months period is reached. Sec. 4. A clear majority of two-thirds of those present, and voting shall be necessary to decide any, or what penalty shall be imposed.

By virtue of the express authority of the Act of incorporation and these by-laws it is clear there are circumstances under which a member may be expelled, or what is in effect the same thing, have his seat forfeited, or his right to exercise his privileges as a corporate member suspended, and a means of trying him on a charge or complaint, to which either of these punishments is attached, provided.

It therefore becomes necessary to consider whether the present plaintiff has made himself liable to any such punishment, or whether there has been such a miscarriage in the manner of his trial as to make it in law a nullity.

The matter alleged against the plaintiff appears to have originated in this way: Mr. Gzowski, a member of the corporation, stated at a meeting of the committee of management, held on the 21st of November, 1883, that it was commonly reported outside that some members of the board were not meeting their obligations, whereupon it was ordered that the chairman (John Stark) and the secretary (H. L. Hime) be appointed a committee to enquire into the matter, and report thereon. At a meeting of the committee the following day the said sub-committee consisting of the chairman and secretary reported that the result of their enquiries was, that the plaintiff, among others, named was offering to settle his liabilities at 20c. in the dollar, and that they were informed that the creditors of Messrs. Hope & Miller had accepted the settlement; whereupon it was ordered that the secretary write to the plaintiff, calling his attention to by-law No. 24, under which he was disqualified from taking his seat.

The secretary, H. L. Hime, wrote to the plaintiff in accordance with the above resolution; and in the share list, issued on behalf of the corporation and under its authority, of the 22nd November, the plaintiff's name was omitted and continued omitted from the same until this suit was

instituted, without any further proceeding having been taken or charge or complaint made against the plaintiff until the 11th March, 1884, when, in consequence of a correspondence between the solicitors of the plaintiff and defendants, in which the former complained of the alleged action of the defendants, H. L. Hime and John Stark, by writing addressed to the President of the Toronto Stock Exchange, complained "that the plaintiff, in the months of October and November last, took his seat as a member of the Toronto Stock Exchange, and was present at meetings of the board at a time when he was insolvent or bankrupt within the meaning of by-law No. 24, and in contravention of the said by-law; and that the plaintiff in or about the months of October and November last, became insolvent or bankrupt within the meaning of by-law 24, thereby disentitling him to take his seat as a member of the corporation, or to be present at any meeting of the board, and that he has not since been, and is not now entitled to take his seat as a member of the corporation, or to be present at any meeting of the board;" and they requested that the above matter be investigated and determined upon, in accordance with the provisions of the by-laws of the corporation.

On the same day the president informed the board that complaint had been made calling in question the right of Mr. Temple, who was present, to take his seat as a member of the Stock exchange, or to be present at any meeting of the board. It is claimed that he is disqualified, and the matter will be investigated. The complaint was referred to the committee of management.

On the same day, the 11th March, 1884, the committee of management met, of which meeting the following minute is recorded: "*Re R. H. Temple (plaintiff.) A formal complaint made this day by H. L. Hime and H. Pellatt was read.*" And then follows a statement of the complaint as in the complaint signed by John Stark and H. L. Hime.

On the 12th March, the committee met, and Mr. John Stark, one of the complainants, acted as chairman, and Mr. H. L. Hime and Mr. H. Pellatt were on the committee.

The following minute was recorded : " *Re R. H. Temple.* Mr. Temple appeared before the committee, and on being asked by the chairman if he had ever offered to compromise with his creditors said he never was insolvent, but did owe Mr. E. S. Cox, and settled with him. Mr. E. S. Cox also appeared, and was asked if Mr. Temple had settled with him in full, but would not give any direct or satisfactory answer. It was thereupon ordered that the chairman, the vice-president, and the secretary, be a committee to consult Mr. Moss as to the future conduct of the case."

On the 13th March, the committee met, and on the above minutes being read they were ordered to be amended as follows:

" 1. Mr. Temple being asked if he was insolvent denied it *in toto*.

" 2. If he had offered to compromise with Mr. Cox at twenty cents on the dollar, gave no reply ; but said that he had then owed Mr. Cox money.

" 3. That he did not owe any outsiders—a lie.

" Mr. Cox on being asked if Mr. Temple had compromised with him at twenty cents on the dollar said he had not been settled with at less than one hundred cents on the dollar ; also that he might have said that Mr. Temple had offered him twenty cents on the dollar.

" 2. That he had no claim against Mr. Temple.

" 3. Asked if he had any note of Mr. Temple's to which he gave no reply."

On the 14th March, the committee again met. Mr. Stark was again the chairman, and the following minute was recorded : " *Re R. H. Temple.* A letter from E. S. Cox, giving more explicit information in this matter was read ; and thereupon it was ordered that it be referred to the legal committee."

On the 15th March, the committee again met and the following minute of their proceedings is recorded :

" *Re R. H. Temple:* Mr. E. S. Cox appeared before the committee, and answered questions as follows :

" No. 1. Was Mr. R. H. Temple a defaulter to your firm (Messrs. Cox & Worts) in any transaction or statement of account since he (Temple) commenced business in the name of R. H. Temple & Co ? A. He was, if owing us money he did not pay.

" No. 2. Q. At what time did he become indebted to your firm ? A. In October, 1883.

" No. 3. Can you state the amount of his indebtedness ? A. Under \$2000.

" No. 4. Q. You have asked him for a settlement of account ? A. I did ask.

" No. 5. Q. What answer did you receive ? A. He could not pay.

" No. 6. Q. Have you at any time since received any moneys on account of such indebtedness ? A. No. I decided to write it off.

" No. 7. Q. You still hold a claim against his seat on the Stock Exchange ? A. I do under condition that if he is not re-elected I do not lose my claim against his seat.

" No. 8. Q. Did your firm (Messrs. Cox & Worts) write off the debit balance after failure of efforts to get paid in full and after offers of composition by R. H. Temple & Co ? A. Yes.

" No. 9. Q. The date when such offers of composition, if any, were made ? A. Between middle of last October and December.

" No. 10. Q. The date when the debit was written off ? A. In December last.

" No. 11. Q. Did you reserve your claim upon the proceeds of the seat in the event of its being sold ? A. Yes.

" No. 12. Q. Were you in October and November last satisfied that Mr. Temple was solvent or able to meet his debts and liabilities in full ? No answer was given."

On the 17th of March the committee again met, and the following minute appears recorded :

" Mr. Temple was present, and the questions put to Mr. Cox on the 14th inst. and Mr. Cox's answers thereto were read to him. He admitted that the answers to the first

three questions were correct, but after that he stated that his solicitor's had advised him to make no replies, and he accordingly refused to give any further explanation. Ordered that the legal committee consult the solicitor as to further steps to be now taken."

On the 25th of March the committee met, Mr. Stark again in the chair, and Mr. Hime acted as one of the committee, when the committee made their report with the preamble: "*That after careful and patient investigation and enquiry, and after hearing the statements made by Mr. R. H. Temple and Mr. E. S. Cox,* and after consulting the solicitor, finding in detail all the complaints in the written complaint proved, that is to say : that the plaintiff while insolvent or bankrupt in October and November took his seat as a member of the Stock Exchange and was present at meetings of the board in contravention of the by-law 24: that the plaintiff was insolvent or bankrupt within the meaning of by-law 24, and that he was not since October last, and is not now, entitled to take his seat as a member of the Toronto Stock Exchange or be present at any meeting of the board."

 The report was signed by John Stark, as chairman.

On March 26th, the board received the report, and resolved that the committee of management be requested to call a special meeting of the board for Tuesday, April 1st, at 1 p. m., to pass judgment in the case of Mr. R. H. Temple.

On April 1st, 1884, the following minute of the board appears recorded :

"At the close of the morning board it was moved by Mr. Forbes, seconded by Mr. Beatty, and resolved, that the meeting do now resolve itself into a special meeting for the purpose of passing judgment in the case of Mr. R. H. Temple, notice of which has been duly given in accordance with the by-laws."

Mr. Temple having addressed the board at length, stating that he had not been insolvent at the time stated by the committee in their report, and Mr. Stark, the chairman of

the committee, having informed the meeting as to the nature of the enquiry on the part of the committee into Mr. Temple's case, it was resolved, in order to give all present a clear opinion upon the matter, the correspondence in connection with the case he read to the board. The secretary, having read the same, Mr. Temple called the attention of the board to the fact that between November and March 17th, no action had been taken by the committee, and stated that Mr. Cox, to whom he was stated to be indebted, was equally indebted to him, and that, although advised by his solicitors to proceed against Mr. Cox, he had not done so. Mr. Cox, in reply, stated that his firm was in no way indebted to Mr. Temple, and he wished the board to understand this. At 2.30 p. m., the meeting was adjourned until Wednesday, April 2nd, at 11 a. m., when the following minute was recorded:

"After considerable discussion, in which Mr. Stark defended the action of the committee, asserting that the committee in all their dealings had not been moved by any malice towards Mr. Temple which he had alleged, and after Mr. Brown had made a statement regretting that Mr. Temple's solicitors should have attacked the committee in the way they had done when writing to them, Mr. Temple in conclusion stated that when he received the letter of the committee calling his attention to the rule regarding insolvents he had consulted his solicitors, and not wishing to clash with the board was the reason that induced him not to appear before the committee. He again asserted he had not been insolvent as stated by the committee: that he had all along done his best to meet the committee, and stated that the report of the committee was not correct, and that in refusing to answer the questions of the committee he had followed the advice of his solicitors. * * Resolved that in the matter of the complaint made against Mr. R. H. Temple and dated March 11th, 1884, the board having heard the report of the committee of management thereon, dated March the 25th, 1884, and having heard the statement, correspondence,

&c., submitted therewith, hereby adopt the said report, and find the complaint proved as stated in said report."

The vote on this was fifteen for and six against, and was not taken by ballot but openly.

On the 10th of March, 1884, the plaintiff sent to the treasurer of the defendants the fee of \$20, payable by members to the gratuity fund, which the treasurer, acting under the direction of the committee of management, returned.

After the examination of the plaintiff and Mr. Cox on the 12th of March, the latter, on the 13th of March, addressed a letter to Mr. Stark as chairman of the committee to the following effect: "After consideration I have concluded that my answers to your enquiries yesterday were not explicit enough. Let me now say that the settlement was effected by my firm writing off his debit balance, and freeing him from all liability.

On the 7th March, 1884, Messrs. McCarthy, Osler, Hoskin, and Creelman, addressed the following letter to Henry Pellatt, Esq., president of the defendants' corporation.

"DEAR SIR,

"Re R. H. Temple.

"We are in receipt of a letter from the secretary of the Exchange enclosing the minutes referring to the communication signed by Mr. Temple as to his not being able to take his seat at the board. From a perusal of such minutes it would appear that no complaint was ever filed, no action taken by the Exchange, and that there was no legal evidence to found the letter, we have, therefore, advised Mr. Temple that so far nothing has been done under the by-laws which can be said to be in any sense a suspension or expulsion from the Exchange, and that he does not come within the rule referred to, we trust, therefore, the matter can be allowed to drop, and would request you to reinstate Mr. Temple's name in the published list of members in the share list."

On this, according to minute of the 8th March, 1884, on motion of Mr. Hime, seconded by Mr. Stark, it was resolved that Mr. Charles Moss be appointed standing counsel for the Toronto Stock Exchange, and that his opinion be taken

as to the legality of the action of the Exchange, *Re R. H. Temple.*

It is thus made manifest that the subsequent proceedings, which are above referred to, were not taken for the *bona fide* purpose of trying or investigating a complaint made against the plaintiff under the by-laws of the corporation, but for the purpose, if possible, of sustaining the illegal action of the committee of management in the course they had pursued with the object of preventing the plaintiff from enjoying the privileges and exercising the franchise, pertaining to a corporator of the Toronto Stock Exchange.

The plaintiff seeks by this action both damages for an illegal suspension of him from the enjoyment of these franchises and privileges; and also prays for an order in the nature of an injunction to restrain the defendants from denying the same to him, and to compel them to insert his name in the books of the corporation as a member in good standing.

I presume, although their conduct may have been irregular in the way in which they have dealt with him, they have a right to shew that he is not entitled to all or any of the relief he has asked.

Thus, though they may have been wrong in denying to him the benefits that would have accrued to him as a member of the corporation between the 21st November and the date of the formal complaint against him on the 11th March, they are not prevented from shewing him disqualified from taking his seat. This renders it necessary to consider the legality of the defendants' action in reference to that complaint, which involves the enquiry as to whether the plaintiff has done anything to disentitle him to the status of a corporator or has otherwise become so disentitled under the by-laws of the corporation, and also the validity of the proceedings taken against him.

The complaint consists of two heads, but both based upon the alleged fact that the plaintiff was insolvent within the meaning of by-law 24.

The first question then to be determined is, what is the

insolvency or bankruptcy that the said by-law is directed against? Does it apply to the case of a person unable to meet his debts or obligations, or only to the case where under an insolvent or bankrupt law his estate and effects are transferred to the control and management of an assignee for the benefit of creditors, including therein the case of a member making a voluntary assignment for the benefit of his creditors avowedly because he is unable to meet his engagements in full? If there had been an insolvent or bankrupt law in force at the time the by-law was passed there would be no reasonable ground for contending that its operation would not be confined to a person who had his estate put in compulsory liquidation or had made an assignment for the benefit of creditors. The difficulty is caused from the fact that we had not at the date of the by-law, and have not now, any insolvent or bankrupt law, and the by-law gives no definition of what is meant by insolvent or bankrupt.

I am of opinion, notwithstanding this, no other reasonable and operative construction can be given to its provisions than that these terms refer to an adjudged insolvent or bankrupt under a bankrupt law, and the framers of the by-law must have had such a law in contemplation.

It is clear a mere default in payment of obligations was not intended to be treated from the time of default as an insolvency or bankruptcy, because by-law 19 is expressly framed to meet a case of such default, and the penalty is not forfeiture of the seat but suspension for a time.

Then section three of the by-law provides for the insolvent or bankrupt getting his discharge or effecting a settlement with his creditors—things that insolvent and bankrupt laws usually make provision for—making application within six months from the date of his insolvency or bankruptcy for re-admission to the corporation. This clearly indicates that a definite time can be attached to the insolvency which will be patent and known, and is not made to depend upon the unknown condition of a man's affairs. Moreover it is provided by section 6 that any

balance of the proceeds of sale of his seat after satisfying the claims of the corporation, shall be handed over to the insolvent's assignee or the legal representative of his creditors, and no provision is made for paying any portion of such proceeds to the insolvent himself, thus clearly indicating that the framers of the by-law had in their minds solely the case where the interest of the member in his own estate had absolutely passed out of him, and some other person, not as a creditor but as representing all his creditors, had a status entitling him to receive such balance. If a member had thus openly become insolvent or bankrupt, the fact would be notorious, and the officers of the corporation might well be permitted to take notice thereof and exclude him without any further enquiry from the privileges of membership. Insolvency or bankruptcy is not an offence against any of the by-laws of the corporation, but taking the seat may possibly be after the insolvency; and if that be so, if the defendants' contention be right, the plaintiff was an offender the moment he was elected, for financially he was, according to the evidence, with the full knowledge of the board of his then position, worse off than at the time he was suspended from or denied the privileges of membership in November, 1883. There is no by-law that forfeits an insolvent's seat, but it is by section 2 of by-law 24 placed under the control of the corporation for the specified purposes of paying fines and fees to the corporation, and other liabilities thereto, and to the members individually, and the surplus, if any, goes to the assignee or representative of the outside creditors; while under by-laws 19 and 20 a member in default or convicted of a criminal offence, may have his seat absolutely forfeited.

I am, therefore, of opinion as a matter of law that the action of the defendants in relation to the plaintiff was wholly unwarranted, and he is entitled to all the relief he has sought.

But were it not so I am of opinion the proceedings of the defendants were wholly illegal and void. In November, when the first interference with the plaintiff's rights

took place, there was no complaint against the plaintiff that gave the board or committee of management any jurisdiction or right to enquire into the plaintiff's affairs. The suggestion that was acted upon would not have brought the plaintiff to answer for being an insolvent, but merely for being in default under rule 42, if that by-law has relation to the default of a member, and not to a layman in his transactions with a member; and the way in which the suggestion was made would not authorize any proceedings under that by-law.

The origination of the complaint by members of the committee was, as I have already said, not a *bona fide* complaint but a complaint by the chairman of the committee of management and a member of the committee which had illegally attempted to deprive the plaintiff of his privileges, and was designed to support or make valid that illegal action. Then, contrary to the principles of natural justice, these complainants took part in the investigation, not as complainants and prosecutors merely, but as judges, and the chairman, Mr. Stark, reports to the board or corporation his own judgment and that of his fellow complainant and their associates on the committee, that the charge had been proved; upon evidence too, which, in my judgment, was wholly insufficient to establish the complaint. The evidence summed up amounts simply to this: The plaintiff had some transactions with Mr. Cox, or the firm of Cox & Worts, in which the latter claimed the plaintiff owed them something under \$2,000, and which they, for reasons satisfactory to themselves, chose to write off their books. The plaintiff admitted that he had had transactions with them on one or more of which they had a claim against him such as Messrs. Cox & Worts asserted; but he most emphatically denied that he was insolvent; and alleged that, instead of his owing Cox & Worts, they were in his debt on their accounts generally. The questions put by the committee to Mr. Cox, in the absence of the plaintiff, from the manner in which they were framed, bear internal evidence that it was upon this.

default they sought to make out the complaint. Reasonable men wishing faithfully to discharge their duty to the corporation of which they were members, and to their fellow corporator, the plaintiff, ought never to have reached that conclusion on that evidence.

Of course it is quite possible the members of the committee might have had some personal knowledge which influenced them in reaching their decision; but, if so, what that knowledge was ought to have been communicated to the plaintiff and his explanation obtained before they assumed to act on such knowledge.

The jury having much more evidence of a character unfavourable to the plaintiff's financial standing than the committee had, have pronounced the plaintiff solvent, and, having regard to the relative positions of the plaintiff towards the defendants with the knowledge the latter possessed of the plaintiff's affairs when he was re-admitted a member of the Stock Exchange after the failure of Hope & Temple, I think they came to a very proper and just conclusion.

I am not, however, assuming a right to review the decision of the committee or the corporation on the merits, for I think the authorities preclude the Court from dealing with the merits of any question within the proper competency of the committee of management to determine. Courts retained to themselves the shadow and discarded the substance of a control over the affairs of societies, clubs and corporations when they enunciated the principle, that for irregularities in the way in which they conducted their investigations where the rights of members or officers were affected, they would in effect overrule their decisions; but no matter how clearly wrong they might be on the merits, unless the judges, so to style them, were influenced by malice or *mala fides*, their decisions should be respected and upheld, be the injustice to individuals never so great.

It seems to me they might equally well have been left to deal with their forms. I do not wish it to be under-

stood that I think it would be at all right to interfere with the discretion of the governing body or the majority of the members in the exercise of that discretion, in the control and management of their affairs generally; but when an attempt is made to interfere with a vested legal right in a member or officer, such attempt should be subject to review by the Courts, upon the principles that govern their decisions when involved in due course of legal proceedings between party and party.

I have not thought it necessary to enter upon an analysis of the many authorities cited to us, as the principles which should govern this case are made reasonably clear and free from doubt, by decisions both in our own and the English Courts. *Dawkins v. Antrobus*, 17 Ch. D. 615; *Labouchere v. Earl of Wharncliffe*, 13 Ch. D. 346; *Fisher v. Keane*, 11 Ch. D. 353, are fair examples in relation to the questions of merits and irregularities in the latter Courts, while *Cannon v. Toronto Corn Exchange*, 27 Gr. 23, deals fully with both grounds.

I base my judgment upon what I take to be the proper construction of the words "insolvent and bankrupt," in by-law 24, and upon the defective proceedings of the alleged trial of the plaintiff, the manner in which the vote was taken being contrary to the express requirements of by-law 21, that such vote should be by ballot. Moreover, without the votes of the two complainants, Stark and Hime, there was not a sufficient majority in favour of the finding. The total vote, according to the minute thereof, was twenty-one, of which fifteen voted against and six in favour of the plaintiff; among the fifteen who voted against the plaintiff were the said Stark and Hime, thus leaving only thirteen qualified voters, which would not be two-thirds of those present, but it would be two thirds of those present and voting, assuming that Stark and Hime are to be considered as neither present nor voting, which may raise rather a nice question.

I will only add in reference to the course pursued by Messrs. Stark and Hime, in acting as judges upon their

own complaint, the remarks of Mr. Justice Field, in the case of *The Queen v. Justices of Great Yarmouth* 8 Q. B. D. 525, at p. 528, upon the effect of the mayor, who had appealed against his own assessment, sitting to hear like appeals with other justices of the peace. Having dealt with the principles governing in like cases he went on: "Applying those principles to this case it is difficult not to see that the course adopted on this occasion was not only very much to be deplored, but also very much to be condemned. What was done was this: the mayor knowing, as all his brother justices must have known, that he was one of the litigants, acted in five appeals and reduced the amount of the assessment, a decision which, when his own property came to be considered, it is impossible to say would not have considerable effect upon the minds of these justices who had to decide the appeal. They state that the reductions were their united judgment; but if they discussed the matter among themselves, and if the mayor said anything to his brethren upon it, what he said must have been that which he was going to repeat afterwards in his own case. They may have been legitimate arguments and well founded, but it is impossible not to see that there was a relation produced between the mayor and the other justices which would tend to induce in their minds a bias from which the judicial mind should be kept free."

And again, at page 527, he says: "The administration of justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt. It is not enough that the conclusion arrived at was right, and that it has been arrived at on right principles, for every person having a personal interest in any litigation or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that, unconsciously to himself, a bias adverse to the due administration of justice might take possession of his mind. This principle is acted on in a case of less importance than that

of the administration of justice, namely, the relation of principal and agent."

The chairman of the committee of management, Mr. Stark, the secretary, Mr. Hime, and the other members of the committee, were performing a *quasi* judicial duty, and the remarks of Field, J., are therefore appropriate, though in the case then under consideration the magistrate had an indirect pecuniary interest, which appears to be wanting in the present case; and I am quite sure the gentlemen referred to would not have been influenced by any consideration of that kind. Many men attach very little importance to money, but a great deal to their own actions and opinions. It is quite impossible, in the present case, not to see that Mr. Stark and Mr. Hime entered upon the enquiry with the predetermination to decide against the plaintiff, for there appears to be no sufficient reason, under the circumstances in evidence, for them to have assumed the position of complainants, except that of upholding the illegal action of the committee of management in writing to the plaintiff as they did on the 21st of November, 1883, and immediately, without any authority whatever, removing the plaintiff's name from the share list.

There has been no ground made out for disturbing the verdict of the jury, and the rule *nisi* must be discharged, with costs.

ROSE, J.—I agree that insolvency or bankruptcy, under by-law 24, must mean an act, not a state. It must be an act which can be ascertained as happening on a day certain, for on such day the seat is to revert to the control of the corporation, and after such day it becomes an offence for the insolvent to take his seat at the board.

From such day the period of six months is to be reckoned upon the expiry of which his right to seek readmission is at an end. On the first day after the six months expire, the seat may be sold, and no claim upon the proceeds can be made by him.

If, as was contended, the day can be ascertained and fixed by a trial, then the by-laws do not provide for a trial to ascertain such fact. If they do, no such trial took place before the acts complained of.

By-law 13 affords no assistance, for prior to the leaving of the plaintiff's name off the stock list, no complaint was made in writing; and by-law 21 may be passed by, as it provides only for an appeal by a member against whom a complaint is made; and in this case there was no appeal.

The offence must therefore be found defined, and procedure provided by by-law 24, and such by-law does not, so far as I can judge, afford any ground of defence to this action.

The committee, without trial, assumed the insolvency, and acted upon such assumption. The jury have found that there was no insolvency, and, in the absence of a by-law providing for ascertaining the fact, it seems to me such finding by the jury is conclusive.

The fact then being that the plaintiff was not insolvent when his name was removed from the list, and he was deprived of his rights as a member of the Stock Exchange, the action of the committee was wholly illegal; and the corporation having adopted such illegal act, I am of the opinion the verdict is right.

Order nisi discharged, and motion dismissed.

[COMMON PLEAS DIVISION.]

STUART ET AL. V. MCKIM.

Garnishment—Money in hands of speaker—Issue directed under O. J. Act, Rule 373—Form of.

The defendant, a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the Assembly, which he handed to the Speaker of the Assembly to wait the action of the House with regard to the alleged bribery. The plaintiffs, judgment creditors of the defendant, issued an order attaching all debts due from C. to the defendants, claiming that the money so handed to him became a debt payable to the defendant.

The Court, GALT, J., dissenting, without expressing any opinion on the merits, directed an issue to be tried, under Rule 373, O. J. Act, as to the garnishees indebtedness.

The form of the issue was subsequently settled by the Registrar, namely whether at the date of the service upon the garnishee of the attaching order, there was any debt due or accruing due from the garnishee to the defendant, which on appeal to the full Court was held sufficient.

THIS was an application on behalf of the plaintiffs, judgment creditors of the defendants, for an order, under the Ontario Judicature Act, Rule 373, on Charles Clarke, Esquire, Speaker of the Legislative Assembly of Ontario, to try the right of the defendant to a sum of money delivered by him to the Speaker on the 17th March, 1884.

During Easter Sittings, May 26, 1884, Walker (of Hamilton) supported the motion. The money when received by McKim became his property, even though he may received it on an illegal consideration: *Pollock on Contracts*, 3rd ed., p. 338; *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *Verney v. Hickman*, 5 V. & B. 271; and when the money was paid over by McKim to Clarke it was money held by Clarke for the use of McKim. It was therefore a debt due by Clarke to McKim, and was therefore clearly attachable. Clarke had no authority to receive the money as Speaker of the Assembly. It is different in the case of an officer of the Court, as he receives the money under some rule of Court or statutory authority. R. S. O., ch. 12, sec. 26, *et seq.*, defines the powers and rights of the Speaker, and no authority is conferred on him to receive the money, and he has no inherent authority as Speaker to

do so. Sec. 45 constitutes the Legislative Assembly a Court of Record to enquire into and punish as breaches of privilege or as contempt of Court certain matters, amongst others, by sub-sec. 3, offering or accepting bribes by any member, but an enquiry can only take place after warrant or order therefor by the Assembly; and it is only in pursuance of such investigation, and by express order of the Assembly, that the Speaker is empowered to hold money, and here the money was attached before the order of the Assembly was passed directing him to hold the money. The Court, however, are not asked to decide the matter, but merely to direct an issue under O. J. Act, Rule 373, to try the question as to the right to the money, and whether there is any debt. He also referred to *Webster v. Webster*, 31 Beav. 393; *McNaughton v. Webster*, 6 U. C. L. J. 17.

Bethune, Q.C., contra.—McKim's affidavits shew that he placed the money in the Speaker's hands as Speaker, and intended to divest himself of it, and convey any interest he had in it to the Speaker, and he never did and does not now claim any interest in it. The Speaker had clearly the right to receive the money and to bring the matter before the House. The powers and authority of Parliament and of the Speaker are discussed in *May's Law and Usage of Parliament*, 9th ed., 68 *et seq.* The plaintiff must first show that McKim could recover the money from the Speaker. Even assuming that McKim intended to receive the money as a bribe, as he received it on an illegal consideration, he could not recover it back. The Speaker in such case is the officer of a Court of Record, as constituted by R. S. O. ch. 12, sec. 45, and the money is received by him in the capacity of an officer or servant of the Court, and money cannot be garnished in the hands of an officer of the Court. *Blund v. Andrews*, 45 U. C. R.; *Dolphin v. Layton*, 4 C. P. D. 130; *Howell v. Metropolitan District R. W. Co.*, 19 Ch. D. 508, 515; *Drake on Attachment*, 5th ed., secs. 509, 514. The House also have directed him to hold the money, and the Court has no power to interfere with the order of the House.

January 3, 1885. CAMERON, C. J.—The defendant, a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the said Legislative Assembly, and he handed the money in the condition in which he received it to the garnishee, the Honourable Charles Clarke, Speaker of the said Legislative Assembly, to await the action of the Assembly in regard to the said alleged bribery.

The plaintiff, a judgment creditor, having become aware of this deposit, caused an order of attachment to be issued attaching all debts due or accruing due to the defendant from the said Charles Clarke, claiming that the money so handed to the Speaker became a debt payable by him to the defendant, and he asks, as the said clerk disputes his liability, that an issue may be directed to try the question of such liability.

The garnishee contends that there is no garnishable debt or liability on his part to the defendant in respect of the said money, which he holds not in his individual capacity, but as the Speaker of the said Legislative Assembly.

I am of opinion, the plaintiff desiring it, and not wishing to leave the matter with the Court to dispose of on the material before it, is entitled to have an issue tried under Rule 373 of the Ontario Judicature Act.

The right to an issue is not absolute, but I think the question ought not to be disposed of on a summary application without pleadings or evidence taken in the ordinary way, against the desire of the plaintiff; and therefore, without intending, in so doing, in any manner to intimate to the plaintiff that I have formed any opinion in favour of the merits on the law or facts being with him, but solely because I think, under the provisions of the said Judicature Act of Ontario, he ought not to be denied the right of having the question tried, and that an order for that purpose should be made.

The issue to be tried will be whether, at the date of the attaching order, there was any debt due or accruing due

from the garnishee to the defendant. The costs of the issue and trial to be reserved for the further consideration of the Court after the said trial.

GALT, J.—This is an application on behalf of the plaintiffs, who are judgment creditors of the defendant, for an order under Rule 373 on Charles Clarke, Esquire, Speaker of the Legislative Assembly of Ontario, to try the right of the defendant to a sum of money delivered by him to the Speaker on March 17, 1884. The Rule is: "If the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined."

It is entirely in the discretion of the Court whether such an order shall be made or not, and in my opinion it should not be granted in this case. See *Wise v. Birkenhead*, 29 L. J. N. S. Ex. 240, and *Seymour v. Brecon*, 29 L. J. N. S. Ex. 243.

There is no dispute as to the facts, so far as the Speaker is concerned. I express no opinion as to the right of McKim to the money.

It appears, then, that on the 17th of March, 1884, McKim, by a letter of that date, enclosed it in a letter, not addressed to Mr. Clarke individually, but to "The Speaker," which is as follows: "Mr. Speaker.—The enclosed one thousand dollars was yesterday paid to me to influence my vote in the Legislative Assembly by Mr. Wilkinson. I place it in your hands at the earliest opportunity on your return to the city."

This letter was laid before the House on that day. The garnishee order was not made until the 19th of March, before which time the matter had been brought under the notice of the House, and referred to a committee. The House subsequently passed a resolution impounding the money. Consequently, I can see no ground for directing the issue of a writ calling on Mr. Clarke to try the right of

property in a sum of money which is not now, and never was, in his possession, except as Speaker of the House of Assembly, under whose control it now is.

ROSE, J.—The attaching creditors desire to have tried the question whether the money handed to the Speaker of the Legislative Assembly of this Province by McKim, was at the time of the attachment on the 17th of March, money belonging or payable to McKim and attachable at the suit of these creditors.

The Speaker appeared by counsel, and stated that he received this money as Speaker, and has no control over it, except subject to the order of the House.

The creditors reply that the money was paid to the Speaker before any order of the house was passed on the subject: that he *virtute officii* had no power to receive it, and that it was attached before he received any direction from the house as to its disposition.

Other questions were discussed at the bar.

It is clear that the questions raised must be tried either upon affidavit on this motion, or upon an issue directed by this Court: See *Wise v. Birkenshaw*, 29 L. J. N. S. Ex. 240.

I do not desire to try the question on affidavits. It is clear we should not do so, unless, in the words of Bramwell, B., in *Seymour v. Corporation of Brecon*, 29 L. J. N. S. Ex. 243, at p. 244, we "were clearly and strongly of opinion, without any doubt at all, that the garnishee was not liable."

It seems to me better not to express any opinion on the question. I certainly do not desire to express an opinion that money in the hands of the Speaker *qua* Speaker is attachable. It was not so argued before us, and therefore no opinion is called for. The argument was, that the money was not held officially.

Unless, therefore, we are willing to try the question on affidavit we must direct an issue, and for the reasons above given I think an issue should be directed.

Judgment accordingly.

The registrar of the Common Pleas Division subsequently settled the form of the issue to be tried in the terms of the judgment as follows:

"Whether at the date of the service upon the garnishee of the attaching order there was any debt due or accruing due from the garnishee to the judgment debtor."

In Hilary Sittings the garnishee moved by way of appeal from the ruling of the Registrar settling the issue as above.

During the same sittings *J. G. Scott, Q.C.*, supported the appeal. The issue directed is not wide enough. It merely directs the question to be tried whether there is a debt due from the garnishee to the judgment debtor. It should have specially determined the questions to be tried, namely, in what capacity the money was received by the Honorable Charles Clarke, whether in his capacity as Speaker of the House, that is in his official capacity, or merely as a private individual; and also whether any order was made by the House relating to the money.

Clement, contra, was not called on.

February 3, 1885. THE COURT dismissed the appeal, holding that the issue as settled by the Registrar was wide enough to raise the questions desired.

[COMMON PLEAS DIVISION.]

MACFIE V. PEARSON,

Attachment under the Absconding Debtors Act—Creditors Relief Act—Priorities.

On the 27th of September, 1884, the sheriff seized certain goods of the defendant under two writs of execution. On the 30th, a writ of attachment under the Absconding Debtors Act, was issued and placed in the sheriff's hands, under which he seized all the defendant's property, credits, and effects. On the 1st and 2nd October, two more writs of attachment were placed in his hands. On the 13th of October, the sheriff sold under the executions and realized enough to satisfy them ; the moneys remaining in his hands pending these proceedings. On the 20th of October, the sheriff received a certificate under the Creditors Relief Act, 1880, and another certificate on the 24th. On the 26th he sold the balance of the defendant's property, &c., seized by him. After this various certificates and executions were received by him. On the 14th of October, he had made the entry in his book under the Creditors Relief Act. None of the attaching creditors had placed executions in the sheriff's hands.

Held, that as the proceedings under the Absconding Debtors Act had been commenced prior to the sale of the goods, and therefore prior to the sheriff being required to act under the Creditors Relief Act, the latter did not supersede the former, so that the moneys realized were subject to such former Act, and must be distributed thereunder : that the proceedings under the latter Act were not well taken ; and that the creditors who had certificates, to come within the former Act, must obtain judgment and execution in the ordinary mode.

THE opinion of the Court was asked upon the following question, viz., whether upon the state of facts appearing upon the Sheriff's affidavit, the proceedings under the Absconding Debtors Act, R. S. O. ch. 68, or the Creditors Relief Act, 1880, 43 Vic. ch. 10, O., are entitled to prevail.

It appeared that on the 27th of September, 1884, the sheriff of Perth seized certain goods of the defendant, under two executions endorsed for nearly \$500.

On the 30th of September a writ of attachment against the defendant as an absconding debtor was received by the sheriff ; and on that day the sheriff seized all the property, credits and effects of the defendant.

On the 1st and 2nd of October following, two other writs of attachment were received by the sheriff, making in all three writs of attachment and two executions up to that date.

On the 13th of October the sheriff sold the goods seized under the two executions, and realized enough to satisfy the same, which moneys he still retained pending these proceedings.

On the 20th of October the sheriff received a certificate, issued under and pursuant to the Creditors Relief Act, 1880; and on the 24th of same month a further certificate under the same Act.

On the 24th of October the sheriff sold, as he said, "the balance of the property, credits and effects of the said J. D. Pearson, so seized by me as aforesaid; and there is now in my custody and possession, proceeds of said sale, the sum of \$2,908.51, for distribution among the creditors of said debtor Pearson."

It was not stated under which authority or process this sale was made, less than one month having elapsed since the receipt of the attachments.

After this date various executions and certificates under the Creditors Relief Act were received. The attaching creditors had not as yet placed executions in the sheriff's hands.

The sheriff on the 14th of October made the entry in his book pursuant to the Creditors Relief Act.

If the Court is of the opinion that the proceedings under the Creditors Relief Act are entitled to prevail, questions have been raised as to rights of precedence among the creditors under that Act.

On February 13, 1885, the case was argued.

Street, Q. C., H. J. Scott, Q.C., Gibbons, Clement, Shepley, and Henderson, for various parties.

February 20, 1885. ROSE, J.—The proceedings under the Absconding Debtors Act are well known. The writ directs the sheriff to "attach, seize, and safely keep all the real and personal property, credits and effects, together with all evidences of title or debts, books of account, vouchers and papers belonging thereto, of C. D., to secure

and satisfy A. B. a certain debt (or demand) of \$, with his costs of suit, and to satisfy the debt and demand of such other creditors of the said C. D., as shall duly place their writs of attachment in your hands or otherwise lawfully notify you of their claim, and duly prosecute the same," &c.

The parties must prove their claims and obtain judgment and execution, and the sale takes place under the executions, unless by order of a Judge after the expiry of a month, or in case of perishable property.

Bail by defendant is provided for. Debts due to the absconding debtor are attached, and upon notice of the writ being served are held until it is sure whether the other assets will be sufficient to pay the debts, when, if not, the sheriff may sue for and recover the amounts thereof. All executions received prior to distribution by the sheriff rank rateably; and the Court or a Judge may delay the distribution in order to give reasonable time for the obtaining of judgment against the absconding debtor.

The provision as to six months in sec. 30 of the Absconding Debtors Act is no doubt in effect repealed by 46 Vic. ch 6, O.

In this case the proceedings under the Absconding Debtors Act were, it seems to me, begun when the first writ of attachment was placed in the sheriff's hands, and it thereupon became the duty of the sheriff to obey its provisions, unless the Creditors Relief Act of 1880, in express terms relieved him therefrom.

The caption of the Creditors Relief Act of 1880, is "An Act to abolish priority of and amongst execution creditors." This is the effect of the Absconding Debtors Act, save as to executions prior to the writ of attachment.

Section 5 provides that "In case a sheriff levies any money upon an execution against the property of a debtor, he shall forthwith enter in a book to be kept in his office, open to public inspection, without a charge, a notice stating that such levy has been made, and the amount thereof; and such money shall thereafter be distributed ratably

amongst all execution creditors and other creditors whose writs or certificates given under this Act were in the sheriffs hands at the time of such levy, or who shall deliver their writs or certificates to the said sheriff within one calender month from the entry of such notice," &c.

The form of notice given by the Statute, shews that the word levy means, realize. The words of the notice are "levied and made out of the property of the said C. D., the sum of \$—."

At the time the sheriff received the writs of attachment no moneys were levied and made, and therefore the sheriff had no directions under the Creditors Relief Act to obey.

No reference is made in the Act to writs of attachment, although provision is made for obtaining goods in the hands of a Division Court bailiff.

By sect. 21, provision is made for attaching debts, but an order is necessary for such purpose.

It is evident that where a debtor absconds, the Creditors Relief Act would not afford the protection given by the Absconding Debtors Act; and if the latter Act be invoked to preserve the property, it would be impossible to work out the provisions of both Acts simultaneously. The sheriff would be vexed with two statutes giving directions as to distribution of the same assets, the object of each being to distribute ratably.

Whatever might be the result if the debtor abscond, after proceedings had been commenced under the Creditors Relief Act, and a writ of attachment were then issued, I cannot feel any doubt that where the proceedings under the Absconding Debtors Act were begun prior to the sale of the goods, and hence prior to the sheriff being required to act under the Creditors Relief Act, the latter Act was not intended to supersede the former and prevent the sheriff continuing to act as he had been directed by the Court.

It will be further observed that under the Creditors Relief Act, the property seized and to be divided, is only the amount necessary to satisfy the execution placed in the sheriffs hands, and as each subsequent execution comes in

a fresh seizure has to be made, while under the Absconding Debtors Act all the assets are at once seized and held to enable creditors to obtain judgment and execution. Under the first Act while the sheriff is waiting for a second execution the debtor might dispose of the rest of his estate; a result not possible after the issue of a writ of attachment.

It will be apparent from reading both Acts that in many respects the provisions are similar, and yet necessarily there exist many differences arising from the fact that the one deals with the whole estate seized and held for distribution, while the other deals with the estate in parcels, brought into the hands of the sheriff from time to time as he may be authorized to seize the same.

If the proceeding under the Absconding Debtors Act could be superseded by the proceedings under the Creditors Relief Act, what is the sheriff to do with so much of the estate in his hands not required to provide for executions then lodged with him.

My opinion upon the facts stated is, that the goods in question and the moneys realized therefrom were and are subject to the provisions of the Absconding Debtors' Act: that the proceedings under the Creditors Relief Act were not well taken: that the sheriff must obey the directions of the Court given to him by the writ of attachment and proceed to distribute pursuant to the provisions of the Absconding Debtors Act: that the creditors who have certificates under the Creditors Relief Act should obtain judgment and execution in the ordinary mode so as come within the provision of the Absconding Debtors Act; and that the costs of the proceedings taken under the Creditors Relief Act must be borne by the creditors instituting them. The costs of the attaching creditors to be paid out of the fund.

Judgment accordingly,

[COMMON PLEAS DIVISION.]

REGINA V. HOLLISTER.

By-law—Market—Conviction—Costs.

A by-law required "All hay, &c., sold at the market or elsewhere in the town of Cornwall, which is required to be weighed by the vendor or purchaser, to be weighed with public weigh scales," &c. A conviction under this by-law was, that defendant in contravention of said by-law brought hay into said town, and had same weighed on scales other than the public scales.

Held, that the conviction was bad in not stating that the hay was sold at the market or elsewhere in said town, and must be quashed; and with costs to be paid by complainant the weighmaster, who had instituted the prosecution for his own benefit, after warning, instead of bringing an action in the Division Court.

THIS was a motion for an order absolute to quash a conviction "for that the said William Sidney Hollister, on the 11th day of December, 1884, brought hay into the town of Cornwall and had the same weighed on scales other than the public scales of said town, the same being in contravention of the Market By-law and amendments thereto of said town."

The by-law required "All hay, straw, grain, coal, farm produce, and animals sold at the market or elsewhere in the town of Cornwall, which is required to be weighed by the vendor or purchaser," to "be weighed with the public weigh scales, &c."

On February 10, 1885, *Aylesworth* supported the motion.
Cattanach, contra.

February 13, 1885. ROSE, J.—It is clear that no contravention of the by-law is shewn by the words setting out the offence charged as appears in the conviction, for the charge is, that defendant brought into the town, &c., not saying that the hay was "sold at the market or elsewhere."

It is manifest that the evidence would not have supported a conviction in the words of the by-law.

The conviction must be quashed.

As the complainant is the weigh master, and has instituted the prosecution for his own benefit, after warning,

and has chosen this forum instead of bringing an action in the Division Court as he might have done, there is no reason why he should not pay the defendant his costs.

The order will therefore be to quash the conviction, with costs to be paid by the prosecutor, James Hanson, to the defendant, Hollister.

Conviction quashed.

[COMMON PLEAS DIVISION.]

GALBRAITH V. IRVING.

Solicitor and client—Security for costs incurred—Misdirection—Adding parties—Assignment of reversion—Future rent—Chose in action.

D. being indebted to the plaintiff for costs in some suits and other matters, by an instrument not under seal assigned to him a lease of certain premises made by D. to defendant, together with all rent in respect of said lease and the term thereby created. In an action to recover from defendant the rent which accrued due after the making of the assignment, the learned Judge charged the jury that while plaintiff remained D.'s solicitor he could not take any security for his benefit, and that he should have disengaged the connection between them, and let D. have independent legal advice.

Held, misdirection, for that the assignment, if not invalid in other respects, was valid so far as it was a security for costs already incurred.

Held, also, that D. was not a necessary party.

Quere, whether the assignment should be treated as of the reversion or of future rent accruing out of the land, and so void as not under seal; or as an assignment of a chose in action, namely, of the moneys payable under the covenants of the lease, and so valid.

THIS was an action tried before O'Connor, J., and a jury, at the Toronto Fall Assizes of 1884.

The facts so far as material are set out in the judgment. The jury found a verdict for the defendant.

In Hilary sittings, the plaintiff in person moved to set aside the verdict for the defendant, and to enter a verdict for plaintiff for \$248.37, on the following grounds: 1. That there was misdirection of the learned Judge in charging the jury that the plaintiff had no *locus standi* in Court, and failed to prove a proper assignment of the rent in question to him. 2. That the verdict is contrary to law and evidence: and, 3. Discovery of fresh evidence.

During the same sittings, February 9, 1885, the plaintiff in person supported the motion.

E. Meyers (of Orangeville) contra.

The following authorities were referred to : *Davis v. Hawke*, 4 Gr. 394; *McIlroy v. Hawke*, 5 Gr. 516; *Fleming v. Duncan*, 17 Gr. 76; *Oakes v. Smith*, 17 Gr. 660; *Waters v. Thorn*, 22 Beav. 547; *Nanney v. Williams*, 22 Beav. 457.

February 28, 1885. ROSE, J.—The defendant was lessee of certain premises in the town of Orangeville, under a lease from one Mary Dean.

Mary Dean signed a document in the words and figures following :

“Orangeville, 28th September, 1882.

“In consideration of certain costs owing by me to G. H. Galbraith of Orangeville, solicitor, in *Dean v. McDonald*, *McMorris v. Dean*, *Sawtell v. Dean*, and other matters and cases, I hereby assign and transfer unto the said G. H. Galbraith a certain lease dated the 10th day of September, 1881, and made by me to John Irving, covering the premises known as the Dufferin House, in Orangeville, together with all rent now due or to accrue due from the said John Irving or his assigns in respect of said lease, and the term thereby created.

“MARY DEAN.”

The rent sought to be recovered in this action was future rent, the first instalment falling due in advance on the 1st day of October next ensuing the assignment.

At the trial Mrs. Dean was called, and in giving her evidence alleged fraud in obtaining the assignment, she stating that what she supposed she was assigning was only one quarter's rent. There is no issue to which such evidence was applicable. It was referred to in the charge of the learned Judge, as will appear.

The charge is as follows : “This case comes down to a very narrow point after all. It is a well established rule of law, and a very salutary one, that a solicitor shall not deal with his client except at what is called arms' length. While he remains solicitor of the client he can advise nothing for his own benefit ; take no security ; no assignment ; no deed to prove it. If he does the law makes it

void. If there are dealings between him and his client to be settled he should disperse the connection completely, and let the client have independent advice, and then he may deal with the client or settle matters, but not otherwise. In view of the cases, in this instance I should feel bound to direct you that the burden of proof is on the plaintiff to shew that he did so. Well, he has shewn the contrary himself. Mrs. Dean is put in the witness box, and she denies the whole affair. She states that the document she signed was presented by him to her : that there were no other parties present : that she thought she was signing a different document altogether, a document assigning one quarter's rent after payment of her board : that she did not understand she was signing a document assigning to him the rents under the lease. I need not say anything more to you. This is my direction to you."

Counsel for the plaintiff, who had declined to address the jury, on an intimation from the learned Judge as to what his direction would be, excepted to the charge.

The jury found a verdict for the defendant.

I am unable to agree that the law is so severe that a solicitor cannot take security from a client for costs already incurred and services rendered, except under circumstances that would support a devise, or bequest, or gratuity.

In *Robertson v. Furness*, 43 U. C. R. 143, it is held that security for future services given to a solicitor is void, even at the instance of a third party ; but the case of *Radcliffe v. Anderson*, 1 E. B. & E. 806, shews that this is not so as to past services.

It is clear that so far as this assignment is security for future services it is void ; but it is valid as security for past services ; and so there would be a valuable consideration to support the assignment and enable the plaintiff to recover from the defendant all rent payable to the assignor unless some other defence be available. Of course the plaintiff would have to account to his assignor for the balance.

It was suggested on the argument that Mrs. Dean should have been made a party. I think not. If such a state of facts exists as enables the defendant to raise the question of fraud, he has not done so on the record, nor has he asked to do so.

If he can make a case for such an amendment he does not require the presence of Mrs. Dean as a party to enable him to do so. If he cannot without her presence as a party, such presence would not assist him. If he wish her added to obtain any relief over against her, the plaintiff has nothing to do with that, and she could only be added on terms to protect both her and the plaintiff.

I think there must be a new trial, costs to abide the event, unless the plaintiff desire to have the Court consider a question which arises on the face of the assignment, but was not raised on the argument. The assignment, it will be noted, is not under seal.

The language of the assignment is inapt. It professes to assign the *lease* and the rent now due and to accrue due in respect of the lease and the term thereby created. So far as it is an attempt to assign the reversion, it of course is void, not being by deed; and it would also appear equally void so far as it is an assignment of future rent as issuing out of the land, and carrying with it the right of distress, &c., and for the same reason, viz: not being by deed. See *Hopkins v. Hopkins*, 3 O. R. 223, and cases there cited. See also R. S. O. ch. 98, secs. 1 and 4.

It may be that it can be supported as an assignment of a chose in action, if the fair reading of the document is that it is an assignment of the moneys payable under and by virtue of the covenants in the lease. See *Ex p. Hall, In re Whiting*, 10 Ch. D. 615; and per Wilson, C. J., in *Re Haisley*, 44 U. C. R. 345, at pp. 348-9.

If I might suggest, it seems to me this is a case in which a settlement might be arrived at which would save continued and expensive litigation.

CAMERON, C. J., and GALT, J., concurred.

Order absolute.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY
DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ABSCONDING DEBTOR.

Attachment under the Absconding Debtors Act—Creditors Relief Act—Priorities.]—On the 27th of September, 1884, the sheriff seized certain goods of the defendant under two writs of execution. On the 30th, a writ of attachment under the Absconding Debtors Act, was issued and placed in the sheriff's hands, under which he seized all the defendant's property, credits, and effects. On the 1st and 2nd October, two more writs of attachment were placed in his hands. On the 13th of October, the sheriff sold under the executions and realized enough to satisfy them ; the moneys remaining in his hands pending these proceedings. On the 20th of October, the sheriff received a certificate under the Creditors Relief Act, 1880, and another certificate on the 24th. On the 26th he sold the balance of the defendant's

property, &c., seized by him. After this various certificates and executions were received by him. On the 14th of October, he had made the entry in his book under the Creditors Relief Act. None of the attaching creditors had placed executions in the sheriff's hands.

Held, that as the proceedings under the Absconding Debtors Act had been commenced prior to the sale of the goods, and therefore prior to the sheriff being required to act under the Creditors Relief Act, the latter did not supersede the former, so that the moneys realized were subject to such former Act, and must be distributed thereunder : that the proceedings under the latter Act were not well taken ; and that the creditors who had certificates, to come within the former Act, must obtain judgment and execution in the ordinary mode. *Macfie v. Pearson*, 745.

ACTION

1. Action for goods supplied—Registered owner of vessel—Evidence—Principal and agent.]—Where one brought an action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between whom and the defendants no relation of agency was proved.

Held, that the plaintiff could not recover.

Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners.

The fact that the vessel got the benefit of the supplies and necessaries did not make the registered owner liable. *Nelson v. Wigle*, 82.

2. Assault and battery—Criminal prosecution—Staying proceedings—Pleading.]—To an action for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate, charging defendant with feloniously, &c., wounding the plaintiff, with intent to do him grevious bodily harm, thereby charging the defendant with felony: that defendant was brought before the magistrate, and committed for trial, which had not yet taken place; that the subject of both the civil and criminal prosecution was the same, and that plaintiff's civil right of action was suspended until the criminal charge was disposed of; *Held*, on demurrer, plea good; and an order was accordingly made staying the civil action in the meantime. *Taylor v. McCollough*, 309

3. Action on mortgage—Judgment in former action—Defence of perjury

—Pleading.]—In an action on a mortgage from defendant S., the defendant H. being in possession, the latter claimed that plaintiff was bringing the action for the benefit of S., who was therefore, as well as the plaintiff, bound by a judgment in a former action, in which H., claiming title by possession, and succeeded against S. in having a lease from the latter to him set aside, the plaintiff, however, not being a party to the action, and having acquired his title prior thereto. S. pleaded that the judgment in question was obtained by the perjury of H., stating the perjury: *Held*, on demurser good. *Stewart v. Sutton et al.*, 341.

4. Husband and wife—Bond by husband conditioned that executors pay money to wife—Nudum pactum—Law and equity—Incomplete gift—Seal—Implied consideration.]—W. G. gave to his wife M. G. a bond conditioned as follows: "That my executors shall pay M. G. \$200 in one year, and \$200 in two years after my decease, and these payments to be made as above stated to M. G., I bind myself to make full provision for in my will to be hereafter made. And should I not make a will this shall be full authority to my executors to make such payments. When my executors fulfil the above named obligation by making such payments, the above obligation to be null and void, otherwise to remain in full force and virtue.

W. G. died leaving a will, which, however, did not specially mention the above obligation. M. G. alleged that she had left the home of the testator for good cause, and that this bond was given to induce her to return and live with him, which she did, but the learned Judge found otherwise, and that the bond was

wholly without consideration in fact. M. G. now sued the executors of W. G. for the \$400 mentioned in the bond.

Held, that M. G. could not recover for that, if the action was considered as an action of law on the bond, the bond was void, since at law husband and wife could not contract; while if considered as a suit in equity, it was equivalent to a suit for specific performance, or the enforcement of an imperfect gift, and in either case equity would not aid a volunteer, neither did the presence of a seal make any difference.

Held, also, that the bond could not be regarded as a declaration of trust. *Glass v. Burt*, 391.

Verdict against some bar to further action against others for same libel.]—See LIBEL AND SLANDER, 2.

Notice of — Constables.]—See REPLEVIN, 1.

Against executor — Joinder of debtor to estate — Collusion.]—See FRAUD AND MISREPRESENTATION, 1.

For injury caused by destruction to highway — Liability of persons contributing to cause same.]—See HIGHWAY, 2.

AGREEMENT.

By municipal corporation with officer to account for fees received by him in respect of another office — Validity.]—See MUNICIPAL CORPORATION, 1.

ARBITRATION AND AWARD.

Appeal from award under Dominion Railway Act, 1879 — Practice.]—See RAILWAYS, 4.

Arbitration in cases of separation of incorporated villages from townships — Right of action — 36 Vic. c. 48, O. secs. 9, 11, and 27.]—See MUNICIPAL CORPORATIONS, 4.

ASSESSMENT AND TAXES.

1. Tax sale — Agreement — Joint purchase — Illegality — Statute of Frauds — Signature by initials — Sufficiency of memorandum — Pleading.]—At a tax sale of lands, J.R.R. and T.A.K., finding there would be a contest between themselves for lots 1118 and 1119, signed an agreement with their initials in the margin at the bottom of the page of the Gazette containing the list of lands to be sold, as follows: Mr.J.R.R. & Mr.T.A.K. We buy on joint account of 1118, 1119, sheriff's Nos. above. J.R.R., T.A.K.

The sheriff's numbers had not been printed in the Gazette, but T.A.K. had prefixed them in ink to most of the parcels on that page of the Gazette, including Nos. 1118 and 1119. It was not stated anywhere in that list that these numbers were sheriff's numbers. J. R. R. having bid for the lots, and afterwards caused them to be conveyed to B., T. A. K. now brought this action against J. R. R. and B., claiming specific performance of the above agreement, and a declaration that J. R. R. and B. were trustees for him of an undivided moiety of the lands.

Held, affirming the decision of Prou foot, J., that the above constituted a sufficient memorandum of the agreement within the Statute of Frauds.

The manner of paying the amount of taxes, or by whom payment was

to be made, was not one of the essentials of the contract as between the parties. The implication of law would be that whoever paid so as to complete the sale should have contribution of a moiety from the other.

Held, further that the defendant appealing not having pleaded the defence of the statute, could not claim the benefit of it.

Held, also, that the above agreement was not illegal, nor did it make any difference that it was a tax sale. *Keefer v Roaf*, 69.

2. *Tax sale—Proof of taxes in arrear—Warrant to sell—32 Vic. c. 36, secs 9, 128—R. S. O. ch. 180, secs. 90, 127.]*—A sale in 1880 of non-resident lands for taxes being impeached on the ground of no taxes being due, the original non-resident collector's roll for 1877, 1878, and 1879, were produced, shewing amounts in arrear for each year respectively, which with interest amounted to the sum for which the land was sold. The due preparation of the warrant to sell, and advertizing in the Official Gazette were also proved.

Held, sufficient proof of the taxes being due.

It was objected that the warrant was not addressed to any one. It recited that the treasurer had submitted to the warden the land liable to be sold, and proceeded : "Now, I, the warden, command you," &c. This was given to the treasurer, was produced by him, and was acted on by him. The warrant purported to be drawn up pursuant to 32 Vic. ch. 36, sec. 128.

Held, that the warrant was sufficient.

The Court will not be punctilious in adhering to the letter of the

statute where there is reasonable accuracy, and no possible prejudice resulting from literal inaccuracy in the frame of the warrant to sell. *Fitzgerald et al. v. Wilson et al.*, 559.

Assignment for benefit of creditors not within Chattel Mortgage Act.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

ATTACHMENT OF DEBTS.

Garnishment—Money in hands of speaker—Issue directed under O. J. Act, Rule 373—Form of.]—The defendant, a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the Assembly, which he handed to the Speaker of the Assembly to wait the action of the House with regard to the alleged bribery. The plaintiffs, judgment creditors of the defendant, issued an order attaching all debts due from C. to the defendants, claiming that the money so handed to him became a debt payable to the defendant.

The Court, GALT, J., dissenting, without expressing any opinion on the merits, directed an issue to be tried, under Rule 373, O. J. Act, as to the garnishee's indebtedness.

The form of the issue was subsequently settled by the Registrar, namely whether at the date of the service upon the garnishee of the attaching order, there was any debt due or accruing due from the garnishee to the defendant, which on appeal to the full Court was held sufficient. *Stuart et al v. McKim*, 739.

BANKS AND BANKING.

A bank manager is not acting within the scope of his authority in accepting the cheque of a customer to deliver to another customer on a particular day, or on the happening of a specified event. *Grieve v. The Molson's Bank*, 162.

Obtaining guarantee by misrepresentation of manager—Void contract.]—See FRAUD AND MISREPRESENTATION, 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Consideration—Misrepresentation.]—To an action on four promissory notes made by the defendant and one H., payable to the plaintiff, the defendant set up that the notes were given for the purchase of the plaintiff's interest in certain homestead lands in the State of Michigan, H. being the purchaser and defendant surety; that under the laws of Michigan only persons of 21 years of age could homestead lands and that the plaintiff was under that age. There was no representation that plaintiff was of age, and H. obtained from plaintiff a surrender of his interest in the land, whereby he was entitled to have himself located in his stead, which he otherwise might have had difficulty in doing, and he got the same rights which he would have got if the plaintiff had been of full age.*

Held, that it could not be said that there was no consideration for the notes, nor any misrepresentation; and the plaintiff was therefore held entitled to recover. *Fletcher v. Noble*, 122.

2. *Promissory note—Extension of time for payment—Parol evidence of.]—Held*, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand, was not admissible.

Per GALT, J.—Even if the evidence was admissible, by the terms of the agreement, in this case, the time was to be suspended only on performance of certain conditions, which the defendant had failed to do, and therefore the plaintiff was entitled to enforce immediate payment. Porteous et al v. Muir et al, 127.

3. *Promissory notes—Collateral security—Agreement—Principal and surety—Giving time on principal debt—Payment.]—On the 29th August, 1877, defendant R. made a note of that date for \$700, at eighteen months, in favour of D., and for his accommodation, which R. gave to D. without any restriction as to its use. D. endorsed the same and handed it to the plaintiff; and at the same time gave the plaintiff his, D.'s own note of the same date at three months taking from plaintiff the following receipt: "Received from R. a note endorsed by D., payable eighteen months after date, for \$700, which note is given me only as collateral security for the payment of certain note endorsed by me for D.; and when said note is fully paid, I agree to return same." On the 24th September, a statement of account took place between the plaintiff and D., when D. took up the note of the 29th August, by giving plaintiff another note for the like amount at three months.*

Held, Rose, J., dissenting, that the true construction of the agreement was, that D. should have

eighteen months, or so much thereof as the plaintiff choose to give him, in which to pay off the \$700; and that D.'s note might be renewed from time to time, so long as payment was not extended beyond the eighteen months; and that under the circumstances the note of the 24th September could not be deemed to have been taken as a payment of the note of 29th August.

Devanney v. Brownlee, 8 A. R. 355, distinguished.

Per Rose, J.—The effect of the agreement was, that the note was given as collateral security for the payment within the time limited by D.'s note, namely, three months: and the fact that R. had eighteen months to make payment, could make no difference: and, that, apart from the question whether the transaction of the 24th September constituted a payment or not, it operated as a suspension of R.'s rights, whereby she was discharged. *Healey v. Dolsen et al.*, 691.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Assignment for benefit of creditors*—*R. S. O. ch. 119, secs. 1 and 2.*]—An assignment for the general benefit of creditors does not come within the Chattel Mortgage and Bills of Sale Act, R. S. O. ch. 119. *Robertson v. Thomas*, 20.

BOND.

—*By husband conditioned that executors pay money to wife—Incomplete gift—Action—Implied consideration.*]—See ACTION, 4.

BY-LAW.

Conviction—Market—Costs.—See MUNICIPAL CORPORATIONS, 5.

Granting bonus to Dominion Railway Co.—Irregularities—36 Vic. c, 48.]—See MUNICIPAL CORPORATIONS, 2, 3.

CALLS.

By assignees for winding up company—Necessity of all joining—Sending by post.]—See CORPORATIONS, 2.

CASES.

Boale v. Dickson, 13 C. P. 337, remarked upon.]—See RIVERS AND STREAMS.

Caldwell v. McLaren, L. R. 9 App. Cas. 352, followed.]—See RIVERS AND STREAMS.

Corporation of the County of Frontenac v. Corporation of the City of Kingston, 30 U. C. R. 584, distinguished.]—See MUNICIPAL CORPORATIONS, 4.

Devanney v. Rose, 8 A. R. 355, distinguished.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

Gairdner v. Gairdner, 1 O. R. 191, followed.]—See WILL, 8.

Jacques v. Miller, 6 Ch. D. 153, commented on.]—See JUSTICE OF THE PEACE, 1.

Morrison v. Moat, 9 Ha. 244, followed.]—See PATENTS OF INVENTION, 2.

Regina v. Roddy, 41 U. C. R. 291, followed.]—See MEDICAL PRACTITIONER.

Sichell's Case, L. R. 3 Ch. 119, distinguished.]—See CORPORATIONS, 1.

Ward v. Smith, 11 Price 19, not followed.]—See JUSTICE OF THE PEACE.

CERTIORARI.

Police magistrate—Justices of the peace—Conviction.]—See POLICE MAGISTRATE, 1.

Effect of Appeal to Quarter Sessions.]—See MEDICAL PRACTITIONER, 2.

CHARITABLE INSTITUTIONS.

Mortmain Acts—Impure personality—Attempted ratification by heir of void bequest to charity.]—See STATUTES OF MORTMAIN, 1.

CHIEF OF POLICE.

Power to appoint—Municipal corporations—Board of police commissioners.]—See MUNICIPAL CORPORATIONS, 1.

CHOSE IN ACTION.

Assignment of chose in action—Right to sue on—New trial.]—Held, ROSE, J., expressing no opinion on the point—that where an assignment of a mortgage on land (was

absolute in form, though as a matter of fact the assignor retained a right to part of the money, an action on the covenant in the mortgage must be brought in the name of the assignee.

A new trial was granted in this case, there being circumstances requiring further consideration, with leave to so amend the pleadings and add such parties as might be necessary. *Ward v. Hughes*, 138.

COMPANY.

See CASES UNDER CORPORATIONS.

COMPENSATION.

Replevin—Notice of action.]—See REPLEVIN, 1.

CONTRACT.

For persons claiming interest in road allowance—Arbitration—Right of action—44 Vic. c. 241, secs. 15, 16, O.]—See HIGHWAYS, 1.

CONSTABLES.

1. *Deed ineffectual as conveyance, effectual as contract—Statute of Frauds—Principal and agent.*]—W. signed and sealed a deed of conveyance of certain land to C., who supposed him to be the owner of the land, as he professed himself to be, whereas he was really only acting as agent for M., the owner. M. now brought this action against C. for specific performance of, as he alleged, a contract on C.'s part to purchase the land. There was no note or memorandum of the alleged contract, other than the said deed, which was

signed and sealed by C., and was in the ordinary short form, and acknowledged the receipt and payment of the purchase money, though the evidence shewed that only 10 per cent. of it had been actually paid. It did not appear that the deed had ever been delivered.

Held, that the deed, though incomplete as a conveyance, was evidence of a contract of sale, sufficient to satisfy the Statute of Frauds.

Held, also, that though W. professed at the time of the contract to be the owner of the land, yet, as in reality he was acting as agent for M., M. could avail himself of the contract, and was entitled to judgment. *McCarthy v. Cooper*, 316.

2. *Husband and wife—Contract by married woman to convey to railway—Non-joinder of husband—Imprudence—R. S. O. ch. 125, s. 19—35 Vic. ch. 16, O. s. 1—36 Vic. ch. 18, O. s. 3.]*—Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband :

Held, that the Company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully *compos mentis*, and no unfair advantage having been taken of her, the agreement could not be set aside.

B.'s marriage took place in 1876, and the land was held by her to her separate use.

Held, that the concurrence of her husband in the contract was unnecessary, nor was it necessary of him to join in the conveyance. *Bryson et al. v. The Ontario and Quebec Railway Company et al.*, 380.

3. *Agreement to advance money—Construction—Breach—Measure of damages.*]—Defendant agreed to furnish plaintiff with money to construct a drain in the township of Dunwich, known as the Mennie drain the amount to be furnished "not to exceed the sum of \$1,500 at any time," and to pay the sum to plaintiff as often and in such sums as might be required, the plaintiff to give the defendant his note for each sum required, and to pay defendant interest at 12 per cent. per annum for the use of said moneys.

Plaintiff alleged that upon the strength of this agreement he contracted with the township to construct the drain. Defendant furnished moneys from time to time to the plaintiff, exceeding in all \$1,500, but not sufficient to complete the drain, and defendant refused to furnish more. The plaintiff borrowed moneys from others at less than 12 per cent interest, but claimed damages for alleged breach of his agreement contending that he was thereby delayed in completing the drain, and that owing to such delay and to the winter setting in he lost largely, instead of making a profit, which he would otherwise have made.

Held, that whether the agreement was to furnish money to the extent of \$1,500 only, or to such extent as might be necessary for the construction of the drain, not exceeding \$1,500 at any one time, the only damages for which defendant was liable would be the difference between the rate of interest payable to defendant under the agreement and the market rate of interest at the time of the breach.

Per ARMOUR, J.—Under the true construction of the agreement the defendant was bound to supply \$1,500 only. *Mennie v. Leitch*, 397.

Bond by husband conditioned, that executors pay money to wife—Nudum factum.]—See ACTION, 4.

CONVICTION.

Unauthorized adjournment—32-33 Vic. c. 31, s. 46 (D). See MEDICAL PRACTITIONER, 1.

CORPORATIONS.

Winding up—Contributory—Laches—Delay in consummating transfer of shares on books of the company—45 Vic. c. 23, D.]—C. purchased shares in a certain company in 1878; but the papers required to make a formal transfer to him in the books of the company, were not furnished to the company till December 20th, 1881. On February 11th, 1882, C.'s name was entered on the list of shareholders, but there was no formal approval of the transfer by the Board of Directors until May 10th, 1883. Before this, however, on November 15th, 1882, C. was notified of a call on the shares for which he was sued, and defended the action, but the action for some reason not explained, was not proceeded with. This was the first intimation C. received that the papers furnished by him had been acted upon, but he appeared to have made no enquiries from the company subsequently to December 20th, 1881. The company ceased to do business on May 13th, 1883, and the winding-up order was made on October 9th, 1883. It did not appear that C. had taken any steps to repudiate his position as a shareholder before these winding-up proceedings; nor did he show any prejudice resulting to him from the failure of the company to notify him

that the transfer to his name had been actually consummated on the books of the company.

Held, that under the above circumstances C. was rightly placed on the list of contributories in the winding-up proceedings.

Sichell's Case, L. R. 3 Ch. 119, distinguished. Re Cole and the Canada Fire and Marine Insurance Co.—Close's Case, 92.

2. Corporation—Action for calls—Proof of defendant being a stockholder—Proof of calls and of notice—Sending notice by post.]—Shares had been assigned in the Company's books by the managing director in his own name, as to twenty shares, and as attorney for another, as to thirty, to the defendant, who did not sign the usual formal acceptance for any of them, but a certificate under the corporate seal of the Company and the signature of the President, Vice-President and Secretary of the Company were sent to him, certifying that he was the registered owner of the twenty shares; and defendant had, in a bill filed against a third party for fraudulently inducing him to purchase the shares, for which he had paid \$500, admitted that he had purchased the fifty shares: Held, that defendant was a shareholder as to these fifty shares.

Semble, that if any further formal acts were required to be done on the part of the defendant to constitute him a shareholder he could be directed to perform it.

Under the circumstances shewn in the evidence set out below, Held, O'CONNOR, J., dissenting, that secondary evidence of the contents of the minute book of the company, shewing the making of certain calls, was improperly rejected.

By 41 Vic. ch. 58, D., the three plaintiffs were appointed "joint assignees" of the Canada Agricultural Insurance Co. for the purpose of winding-up under 41 Vic. ch 21, D. Two of the plaintiffs, the third being unable to attend through illness, met on the 2nd of January, 1879, and made the 4th and 5th calls of 10 per cent. each on the stock of the Company. *Held*, that the assignees must all join in making calls, and that these calls were therefore invalid.

Held, also, that a meeting of the three joint assignees on the 27th of January, after notice of the 4th and 5th calls had been mailed on the 13th January, purporting to confirm the action of the two assignees of the 2nd of January, had not that effect.

The charter of the Company, 35 Vic. ch. 104, D., provides that one month's notice of calls "shall be given." *Per O'CONNOR, J.*, sending such notice by post was not a compliance with this provision. *Ross et al. v. Machar*, 417.

3. *Subscription for stock before incorporation of company—R. S. O. ch. 150—Non-liability for calls.*]—The defendant with others agreed to apply for a patent for a company for manufacturing purposes, under R. S. O. ch. 150, and signed a stock list subscribing for certain shares, and agreeing to pay therefor as provided by the Act and the by-laws of the company. Subsequently a petition purporting to be by thirteen of the subscribers, but omitting the defendant's name, was presented to the Lieutenant-Governor of Ontario for a patent incorporating the petitioners and "such others as might become shareholders in the company thereby created a body corporate," &c. The

stock list, however, subscribed by the defendant appeared to have been filed in the office of the Secretary of State. The petitioners were accordingly incorporated, "and each and all such other person or persons as now is, or are, or shall at any time hereafter become a shareholder or shareholders in the said company under the provisions of the said Act," &c. The defendant did not subsequently to the incorporation subscribe for stock, but on the contrary repudiated his former subscription.

Held, that the defendant was not a stockholder, and was, therefore, not liable for calls on the shares which he purported to have subscribed for. *Tilsonburg Agricultural Manufacturing Co. v. Goodrich*, 565.

4. *Winding-up proceedings—Payment of cheques on deposit accounts after suspension of bank—45 Vic. ch. 23 (D).*]—The bank suspended payment September 15th, 1883. Winding-up proceedings were commenced November 22nd, and an order made December 5th. R. & G. H. purchased a stock of hardware held by the bank on which they owed \$14,000 at the time of the suspension. The bank wishing to close the account sold the balance of the stock to A. H. & Co., \$5700, and agreed to accept in payment cheques of the defendant drawn on his deposit account, and which were drawn on and accepted by the bank on October 31st. For these cheques A. H. & Co. gave their acceptances which were duly paid. Before the stock was delivered R. & G. H. settled the balance of their debt to the bank. In an action by the liquidators of the bank against the defendant to recover back the amount thus paid on the defendant's cheques under 45 Vic. ch. 23, sec. 75, it was

Held, that the plaintiff could not recover, for the defendant had received no valuable consideration from the bank which he should be ordered to repay.

The defendant also owed A. H. & Co. a debt, and gave his cheque on the bank for \$92 in part payment thereof, which the bank accepted from A. H. & Co. on October 23rd, in retiring an overdue bill.

Held, that the amount could not be recovered back.

On November 19th, defendant sold his cheque for \$320 to his uncle, C., who was the local head of the bank which cheque was negotiated and accepted by the bank on November 23rd, (after winding-up proceedings had commenced.)

Held, that, although it probably was an invalid transaction as far as the person who received the money was concerned, there was no payment to the defendant of anything within the scope and meaning of the 75th sec. of the Act. *Exchange Bank of Canada v. Stinson*, 667.

5. *Winding-up proceedings—Payment to creditors*—45 Vic. ch. 23 D. sec. 75.]—The bank suspended payment September 15th, 1883. Winding-up proceedings were commenced November 23rd, and an order made December 5th. The defendants C. & S being depositors in the bank drew a cheque for \$4,000 on November 1st on their deposit account, which was given to D., a debtor of the bank on notes maturing the following December and January. D. gave mortgage security to defendants for the cheque on October 31st. The arrangement was all made about October 5th, although the security was not given until the 31st, and the cheque was not presented to the

bank until November 23rd, when it was accepted as payment of the maturing notes.

In an action by the liquidators of the bank against the defendants, to which D. was not a party, to recover the amount thus paid on the cheque as having been paid to defendants after the winding-up proceedings were commenced, and being an unjust preference &c.

Held, that upon the facts there was no payment by the bank to the defendants, and that the transaction therefore was not within the statute 45 Vic. ch. 23 sec. 75.

C. who was being sued by the bank, obtained defendants' cheque for \$2,118 giving security therefor on November 21st, and retired the notes in suit on November 23rd.

Held, that the defendants could not be ordered to repay the amount of the cheque, as being a wrongful payment under the Act. *Exchange Bank of Canada v. Counsell et al.*, 673.

6. *Member becoming insolvent or bankrupt—Meaning of—Removal of member's name from list—Legality of—Ballot—Two thirds majority—Interest of complainants.*]—The defendants' act of incorporation provided for the appointment of a committee of management to manage the affairs, &c., of the corporation, and, under a by-law, the committee were to consider and report on all offences under the by laws, if submitted to them, and to call a special meeting of the corporation to pass judgment thereon. Power was also given by the Act of incorporation to expel members as by the by-laws should be determined. By by-law 13 all complaints to the committee or corporation were to be in writing. By

by-law 21 any member complained against, might have a hearing before the corporation, and if the complaint be proved, a vote should be taken by ballot—a two-thirds majority of those present and voting being required—first, for the forfeiture of the seat, and then if lost for suspension. By by-law 24 a member becoming bankrupt or insolvent, should not be entitled to take his seat as a member of the corporation, or be present at any meeting thereof; and such seat should revert to the corporation to be sold by them, if the member be not re-admitted within six months from the date of insolvency, and the proceeds applied as directed therein. In November, 1883, without any complaint in writing or notice to the plaintiff or hearing before the corporation, but on the chairman and secretary, whom the committee had instructed to make enquiries, reporting that plaintiff was offering to compromise with his creditors, the secretary, by order of the committee, wrote to plaintiff, calling his attention to by-law 24; and on the same day the list of members was altered by striking out the plaintiff's name. Nothing further was done until March following, when in consequence of a correspondence between the plaintiff's solicitors and the defendants, those members who had previously reported on plaintiff's condition, made a written complaint to the president complaining of the plaintiff having been insolvent in October and November, and of his disqualification thereby under by-law 24, and asking for an investigation by the corporation, which was had, and by an open vote of 15 to 6, the complaint was held to be proved, the two complainants voting with the majority. No steps were taken to declare the seat forfeited or for suspension.

Held, that insolvency under by-law 24, did not refer to a condition of insolvency, but to a definite act of insolvency under a bankrupt or insolvent Act, *e. g.*, by an assignment or the issue of a writ of attachment; and therefore plaintiff did not come within its terms; but apart from this the defendants' proceedings were clearly illegal and void, for in November there was no complaint that gave the committee jurisdiction to interfere; and as the defendant's affairs were to be managed by the committee, they were responsible for the committee's acts; while the complaint made in March was not a *bona fide* one, but merely an attempt to support the previous illegal act; and also the vote should have been by ballot.

Held, also, that though defendants' proceedings were abortive to deprive plaintiff of his seat, the erasure of his name was an act most detrimental to the plaintiff, as it prevented him from carrying on his business as a broker; and he was therefore entitled to recover damages for the loss he had sustained thereby.

Remarks as to the impropriety of the two complainants acting as judges on their own complaint; and if deemed present there would not be the requisite two-thirds majority, but otherwise if deemed neither present nor voting.

Per Rose, J.—In the absence of a by-law providing for ascertaining the fact of insolvency, the finding of the jury herein that plaintiff was not insolvent was conclusive. *Temple v. Toronto Stock Exchange*, 705.

COSTS.

Infant—Costs against next friend.]—Where one commenced an action as next friend to an infant to restrain waste on the infant's property without any notice to the defendant, and without any investigation as to the good reasons which the defendant had for acting in the manner complained of,

Held, that the next friend should pay the costs. *Mill v. Mill*, 370.

Security for costs incurred—Solicitor and client.]—See SOLICITOR AND CLIENT, 1.

Mortgage—Opening foreclosure—Special order as to costs by Court of Appeal—Interest—Costs of writ of execution.]—See MORTGAGE, 2.

COVENANT.

For payment of taxes—Breach—Forfeiture.]—See LANDLORD AND TENANT, 2.

In lease—See TRUSTEES, 1.

CREDITORS' RELIEF ACT.

Attachment under Abandoning Debtors Act—Priorities.]—See ABANDONING DEBTOR, 1.

CRIMINAL LAW.

Simultaneous criminal and civil proceedings—Suspension of latter till completion of former.]—See ACTION, 2.

CROWN LANDS.

Lands granted by Crown by mistake—Surrender—Equity in favour of Crown.]—See TAX SALE, 2.

DAMAGES.

Measure of—Landlord refusing to give possession to tenant.]—See LANDLORD AND TENANT, 1.

Measure of—Breach of agreement to advance money.]—See CONTRACT, 3.

Deduction of Life Insurance from damages for cause of death. See RAILWAYS AND RAILWAY COMPANIES, 7.

For illegal removal of plaintiff's name from members of stock exchange]—See CORPORATIONS, 6.

DEED.

Evidence of contract though incomplete as conveyance—Short form deed—Statute of Frauds.]—See CONTRACT, 1.

Implied consideration—Bond by husband conditioned that executors pay money to wife.]—See ACTION, 4.

DEFAMATION.

See CASES UNDER LIBEL AND SLANDER.

DISTRESS.

Right to distrain goods of third party—Landlord and tenant—Intention.]—See LANDLORD AND TENANT, 3.

DONATIO MORTIS CAUSA.

The defendant's mother, being ill, gave the key of a drawer in a bureau where a mortgage, made by the defendant to her, was kept, to her son J., telling him that she wanted him to give the mortgage to the defendant in case she should not see him again. The defendant was afterwards sent for and came to the house. He saw his mother alone, and deposed that she said: "Robert, your mortgage is there in that drawer—when you go home you can take it with you." He went away without getting it, and she died intestate. After her death J. gave him the mortgage.

Held, that the mandate to J. was revoked when the mother saw the defendant, and as there was no delivery after that by her there was no gift of the mortgage to him.

The mother had signed and given to defendant a year before her death, a receipt for interest on the mortgage; and had endorsed a similar receipt on mortgage, but no money was paid.

Held, a valid gift of interest.
Travis v. Travis, 516.

DOWER.

Discharge of mortgage—Registry Act—R. S. O. 111, sec. 67—Insolvency—Inchoate right to dower—Partnership lands.]—In respect to discharges of mortgages, what the registry Act makes tantamount to a re-conveyance is the certificate of discharge and the registration of it, not the execution of the certificate merely. Therefore, where in 1868, R. O'N. in partnership with J. O'N. executed a mortgage on certain real estate, and his wife joined to bar her dower, and the mortgage money was subsequently paid, and a discharge of the mortgage signed but not registered, and

afterwards the partnership became insolvent, and the mortgagee's executors conveyed the property to the assignee in insolvency, who had now contracted to sell to a purchaser.

Held, that the wife of R. O'N. could not have dower at law in the land in question, neither could she have dower out of the equitable estate, because that had passed away from her husband to the assignee, and the former could not now die seized of it.

In 1868, J. O'N. and R. O'N. executed a mortgage on certain land, which was in full force and unsatisfied at the date of their insolvency. Afterwards in 1879 it was declared by judgment of the Court to have been extinguished by lapse of time. Neither of the wives of J. O'N. and R. O'N. joined in this mortgage.

Held, nevertheless, that, in the face of the assignment in insolvency the extinguishment of the mortgage did not have the effect of again vesting the estate in J. O'N. and R. O'N. so that the dower of their wives attached.

It appearing that certain lands owned by J. O'N. and R. O'N. were part of the assets of the partnership, having been purchased with partnership funds, and the rents afterwards collected and received by the partnership and treated in all respects as partnership moneys.

Held, that the wives of J. O'N. and R. O'N. had no inchoate right of dower in these lands. *In re Music Hall Block, Dumble v. McIntosh*, 225.

Election of widow—Will.]—See WILL, 4.

EARMARK.

Pledge of stock—Identification of pledged stock.]—See STOCK, I.

EASEMENT.

Acquiescence in.]—See TRUSTEES, 1.

Parol license amounting to an easement or grant by an incorporeal right—Necessity of being under seal.]—See LEASE, 1.

ESTOPPEL.

By deed—Railway Company—Grant of lands necessary to enjoyment by railway.]—See RAILWAY, 5.

EVIDENCE.

Parol evidence of extension of time for payment of promissory note.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

Corroborative—R. S. O. c. 62 s. 10.]—See FRAUD AND MISREPRESENTATION, 1.

Secondary evidence of contents of minute book of company—Of holding shares.]—See CORPORATIONS, 2.

Of parol agreement to vary written lease.]—See LEASE, 1.

Railway—Injury from barbed fence—Evidence of common use—Nuisance.]—See RAILWAYS AND RAILWAY COMPANIES, 6.

Of defendant to prosecution under the Ontario Medical Act, in his own behalf.]—See MEDICAL PRACTITIONER, 2.

Proof of taxes having been due on lands sold for taxes.]—See ASSESSMENT AND TAXES, 2.

97—VOL. VIII O.R.

EXECUTORS AND ADMINISTRATORS.

Charge of debts—Carrying on business—Mortgage by executors—R. S. O. ch. 107, secs. 7, 17, 20.]—A testator charged his real estate with payment of his debts, which he directed to be paid thereout as soon as possible, and then devised it to his executors and trustees on trust to sell as soon as they should think prudent, and invest the proceeds and pay an annuity to his widow until sale, and after the sale, invest a sum named, from which to give her a specific annuity, and distribute the proceeds among his family; and proceeded: “Until sold as aforesaid, I direct that my trustees keep my schooners employed for freight and hire as far as possible, and for such purpose to engage all necessary assistants, and keep the said vessels in repair: and may store grain and other goods and merchandize in my warehouse for hire or storage, and may take such action as they think advisable to work and develop my interest in the B. gold mine, but the outlay by them shall not at anytime exceed \$1000.”

The trustees became indebted to a bank for certain expenses incurred in connection with the schooners and repairs to them; and in connection with the warehouse, and to meet this indebtedness, executed a mortgage of the real estate to the plaintiffs who now brought this action for foreclosure. The testator's debts had all been paid before the execution of the mortgage, but there was no evidence that the plaintiffs knew more as to the purpose for which the money was required, than that it was to pay a debt due at the bank by the testate.

Held, reversing the judgment of

FERGUSON, J., that the plaintiffs were entitled to the usual mortgage judgment, for there was no sufficient evidence of notice to them that the money was not to be expended in conformity with the will. *London and Canadian Loan and Agency Co. v. Wallace et al.*, 539.

Direction to pay debts—Executors' power to sell lands not devised—R. S. O. c. 107, s. 19.]—See WILL, 5.

Action against executor—Joiner of debtor to the estate—Collusion.]—See FRAUD AND MISREPRESENTATION, 1.

Will imposing quasi judicial functions on executors—Control by court of exercise of such functions.]—See WILL, 6.

Power of sale—Adverse possession of executor—Express trust.]—See WILL, 2.

FRAUD AND MISREPRESENTATION.

1. *Undue influence—Father and son—Parties—Privity—Action against executor and surviving partner—Corroborative evidence—R. S. O. ch. 62, s. 10.]—D. B. and W. D. B. were partners in a certain Joint Stock Savings Bank, under articles which provided that the partnership should last during their joint lives, and that they should share the profits and expenses. D. B. died in April, 1874, leaving a will, whereby he bequeathed to W. S. B., the son of W. D. B., the residue of his property, including his interest in the bank, and appointed L. his executor. In May, 1874, L. gave W. D. B. a general power of attorney to act for him. In July, 1879, W. S. B. came*

of age, and soon after demanded of W. D. B. an account of the assets of the partnership and a settlement with him; and in November, 1880, W. D. B. gave the plaintiff a cheque for \$8000, handing him at the same time a document for signature, which purported to be a receipt of the said sum in full of all claims on the estate of D. B., and W. S. B. signed it. W. S. B. now brought this action against W. D. B. and L., alleging that after the death of D. B., W. D. B., with L.'s connivance, made certain arrangements for the winding-up of the partnership, and that large portions of the assets of D. B. and of the bank had been realized, and profits made, and converted by W. D. B. to his own use, and claiming to have the said release declared void, and an account of the estate of D. B., and of the partnership, and to have the same wound up, and payment of the share to which he was entitled.

Held, that as to the alleged settlement of November, 1880, W. S. B. and his father could not be said to have been on equal terms, and the document in question was not binding upon the former; that it was clearly the duty of his father, before making any settlement with him, to give him the fullest possible information regarding the estate and his dealings with it, even if then, under the circumstances, a settlement binding on the plaintiff could have been made.

Held, that the suit in its present shape was maintainable, for though the general rule is, that persons who have possessed themselves of the property of the deceased, or are debtors to the estate generally, cannot be made parties to a suit against the executor, yet this rule is relaxed in

the case of surviving partners of the deceased, whom it is allowed to make parties with the executor in order that the plaintiff may have an account of the personal estate entire. At all events such an action may be supported in all cases where the relationship between the executors and the surviving partners is such as to present a substantial impediment in the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners, as seemed the case here, although it did not appear that there had been actual collusion between L. and W. B. D.

W. D. B. alleged that in 1872, D. B. transferred to him as a gift 100 shares of a certain stock, part of the assets of the firm, and as corroborative evidence thereof proved the transfer of the stock to him, and a re-transfer afterward on January 30th, 1873; which re-transfer, he said, was to prevent the surplus of the savings bank appearing to be less, and also produced the printed statement of the Savings Bank of December 31st, 1872, showing this stock.

Held, that this was not such corroborative evidence of the gift as satisfied the Statute R. S. O. ch. 62, sec. 10.

Held, on the whole case, that the plaintiff was entitled to the account asked, and that as regarded the increase or profits in the dealings with the capital of the estate, these should be proportioned in accordance with the amount of such capital owned respectively by the testator and the defendant, W. D. B., and the defendant, W. D. B. should be allowed a liberal remuneration for his exertions, care, time, and trouble in the management of the estate which appeared

to have been skilful and successful.
Burn v. Burn, 236.

2. *Principal and surety—Misrepresentation—Negligence—Alteration of liability—Release of surety.*]—The defendant, at the instance of F., the plaintiffs' manager, endorsed the note of C., to secure an advance to the latter on grain. It was represented to defendant by F. that the giving of his name was a mere formal matter; that only 75 per cent. of the value of the grain would be advanced: that warehouse receipts would be taken, and that he (F.) would from time to time see that the grain was in store, and would hold it in security for the money advanced, crediting the proceeds of any sales upon the note in question. The defendant was subsequently induced, by the representation of F., as the jury found, that it would not alter his position, to sign a guaranty under seal, which, though not intended, as F. stated, to vary the defendants' original liability, as a matter of fact did so, by permitting the plaintiffs to release or abandon their security upon the grain, upon the faith of which defendant became liable as endorser.

Held, that the guaranty was void as against the defendant; and that it was not necessary to prove that the bank manager knew, when he made it, that his representation was false; nor was it an answer that the defendant could have examined the deed for himself, as he was entitled to rely upon the representation of the bank's agent.]—*Molsons Bark v. Turley*, 293.

3. *When contract not void or voidable by reason thereof.*]—Action on covenant to pay contained in chattel mortgage.

Amongst other defences the defendant set up that the mortgage in question was given for the purpose defeating and delaying creditors of the mortgagor, and that the plaintiff (the mortgagee) was aware of that at the time, and aided and abetted the defendant, and that by reason thereof the mortgage was void and the covenant could not be enforced against defendant.

Held, that even if the defence was proved, the defendant, being a party to the fraud, should not be allowed to set it up as an answer to his liability on the covenant. *Milligan et al. v. Headen*, 503.

FRAUDULENT CONVEY- ANCE.

1 Chattel mortgage—Preference—Judgment creditor—Infancy.]—S. & W., a firm, of whom W. was a minor, becoming embarrassed arranged with H., the managing man of J. G. & Co., their principal creditor, to give security for their debt. At the instigation of H. two notes for the amount of their indebtedness maturing at short dates, were made by S. & W., payable to P., and endorsed to J. G. & Co. by P., who was a brother-in-law of J. G., and connected with him in another business, and a chattel mortgage was given by S. & W. on everything they had in their business to P. to secure him, and \$50 was paid him by J. G. & Co., for endorsing the notes. A few days after the mortgage was given C. caused the sheriff to seize S. & W.'s goods under an execution in his hands, received subsequent to the making of the mortgage.

In an interpleader action between P., claiming under the chattel mort-

gage, and C. claiming under his execution.

Held, that the mortgage must be treated as if given to J. G. & Co., for it was made to P. only as a device to avoid the statute against fraudulent preferences, and that upon the evidence, set out below, it must be held void as against creditors.

Pressure will not validate a security unless it be a *bona fide* pressure to secure a debt, and without a view of obtaining a preference over the other creditors.

Semble, that the share of the infant W. did not pass by the chattel mortgage nor by the assignment for the benefit of creditors which was afterwards made. *Powell v. Calder et al.*, 505.

2. Insolvency—Policy of insurance—Assignment of to creditors—Pressure—Preference—R. S. O. ch. 118, sec. 2.]—The jury having found that T. was, to his own knowledge and that of the preferred creditors, unable to pay his debts in full, and that assignment to certain creditors of two policies of insurance and moneys secured thereby, after the larger portion of the property insured had been destroyed by fire, had been made under simulated pressure with the intent on the part of T. to give, and on the part of the preferred creditors to obtain a preference over the other creditors of T.

Held, that the assignment were null and void under R. S. O. ch. 118, sec. 2, as against the other creditors of T. *Ivey and Co. v. Knox, Morgan and Co.*, 635.

Preferential assignment—Chattel mortgage—Pressure.]—See FRAUD AND MISREPRESENTATION, 4.

GIFT.

Inter vivos of mortgage.] — See DONATIO MORTIS CAUSA, 1.

GUARANTEE.

Contract of—Void for misrepresentation.—See FRAUD AND MISREPRESENTATION, 2.

HIGHWAYS.

1. *Ways—Municipal corporations—Roads opened up on lands adjacent to road allowance—Road allowance taken by owners of such lands—Right to open up road allowance—Compensation—44 Vic. ch. 241, secs. 15, 16 (O).]*—Where, on lots closely adjoining original road allowances, roads were laid out and used as public roads during the whole of the present century, the original road allowances having been, during that time, in the occupation of the original owners of the lots and those claiming under them, and used and treated as their own property, the presumption being that they were taken and used in lieu of the roads opened through their land and without any compensation being paid therefor.

Held, that a by-law passed by the municipal corporation to open such original road allowances as of right was invalid, and must be quashed.

It was contended that since the passing of 44 Vic. ch. 241, secs. 15, 16, O., the only remedy for persons claiming an interest in a road allowance was by arbitration to fix compensation; but

Held, that the Act only applies to the case where the council have in good faith intended to open a road allowance, but by mistake have not

done so on the true line. *In re Beemer and the Village of Grimsby, 98.*

2. *Highway—Obstruction—Accident—Action for damages—Contributory negligence.]*—The defendant's premises abutted on Clarence street in the city of Toronto.

The defendants placed a beam at the height of nine and a half feet from the ground along the north limit of Clarence street, a street 29 feet in width, and hung a gate therefrom, and put up another gate across said street about 27 feet further south, the two gates not being exactly opposite to each other, nor of the same width. A lane ran north from said Clarence street. There was an accumulation of rubbish with ice and snow under the beam, which raised up the front wheels, and the plaintiff, while driving along Clarence Street to deliver goods to persons on said lane, was injured by being crushed between the said beam and the load upon which he was seated. He said he knew of the beam, having driven there often, but that his attention was called from it by having to steer his way carefully between the two gates. Clarence street had not been adopted as a highway by by-law.

Held, that although by 46 Vic. cap. 18, sec. 545, O., the Council is prohibited from laying out a road or street of less than 66 feet in width, they may consent to the owner of lands laying one out less in width, and that prior to the Act of 1873 the owner was not prohibited from laying out a road of any particular width; and that as Clarence street had been laid out and used as a public street for many years, having several large business establishments fronting upon it, or with a rear access to

it, and public conveyances had used it for business purposes in all respects as a highway, it might in an action of this kind, between a person using it in the way of business, as it had so long been used, and one who was charged with obstructing it, be found to be a public highway. *Held*, also, that the beam was the proximate cause of the injury, not the ice and snow only, and that the defendants were liable, though the person who allowed the rubbish to thus accumulate might be liable also. *Held*, also, that there was no contributory negligence on the part of the plaintiff. *Bliss v. Boeckh et al.*, 451

HUSBAND AND WIFE.

1 The real estate of a married woman, married after March 2nd, 1872, whether owned by her at the time of her marriage, or acquired in any manner during her coverture, may be conveyed by her without the concurrence of her husband; and her contracts respecting such real estate are binding upon her without the joinder of her husband. *Bryson et al. v. The Ontario and Quebec Railway Company et al.*, 380.

2. *Vendors and Purchasers Act—R. S. O. ch. 109—Absent husband—Wife's conveyance.]*—J. H. by his will dated April 14th, 1874, devised certain property to his daughter, M. A. J., for life, with remainder to her children, and died soon after making the will. M. A. J. died about 1880, leaving five children the youngest of whom came of age in 1884. Before the death of J. H., one of the children, M. J. J. married one C., and C. in 1870 deserted his wife and had not been heard of afterwards.

Held, that M. J. C. could convey her interest in the property, without the concurrence of her husband. *Re Coulter et al. and Smith*, 536.

Contract of married woman to convey to railway—Non-joinder of husband—Improvidence.]—See CONTRACT, 2.

Bond by husband conditioned that executors pay money to wife—Incomplete gift—Nudum pactum.]—See ACTION, 4.

IMPROVIDENCE.

Contract by married woman to convey to railway—Non-joinder of husband—Validity.]—See CONTRACT, 2.

INFANT.

Infant member of firm—Chattel mortgage—Assignment for creditors.]—See FRAUD AND MISREPRESENTATION, 4.

INFORMATION.

False pretences.]—See POLICE MAGISTRATE, 1.

INJUNCTION.

Opening up and extending street—Local improvement by-law not in public interest—Enjoined from proceeding under it.]—P. owned a small piece of land at the south end of a lane or street called Johnson street, 26 feet wide in the City of Toronto, leading from Adelaide street to King street, extending nearly to the line

between these streets, and continued to King street by an irregular private footway. M. and T. owned the adjoining lots on King street, extending back to the centre line, and P. had refused to sell his piece of land to them. They then, with other owners purporting to be owners of adjacent land, petitioned the city council under the local improvement clause of the Municipal Act, reciting that they "were desirous of securing communication between King and Adelaide streets for vehicles by means of the above street, and certain lanes to the south thereof," and asking that said street might be opened up of the full width of 26 feet from Adelaide street to the centre line of the block between King and Adelaide streets at the expense of the property benefited. The sub-committee of the council, to whom this petition was referred, and before whom the plaintiff had appeared to oppose it, said that nothing further should be done without notifying him, but about eight months afterwards, without any further notice to him, they passed a by-law opening up the lane to the centre of the block as prayed, but making no provision for extending it to King street. It was shewn that M. and T. through whose land such extension would pass, had refused to give a right of way for vehicles, as expressed in the petition, and had agreed to pay all costs of opening the lane.

Held, that the by-law had been passed improperly: not in the public interest, but in that of M. and T.; and the corporation on the application of P. was enjoined from proceeding under it.

That a by-law purports to be for local improvement, and not for the general benefit of the municipality,

does not affect the principle which prevents corporate powers from being exercised for the benefit of one individual at the cost of another. *Pell v. Boswell et al.*, 680.

INSURANCE.

Explosion by gunpowder—Statutory conditions.]—In an action on a fire policy, subject to the Statutory conditions, an accidental explosion of gunpowder appeared to have occurred, part of the damage occasioned thereby being due to the explosion itself, and part to the fire resulting therefrom.

Held, ARMOUR, J., dissenting, that under Statutory condition No. 11 the defendants were liable only for the damage resulting from the fire, and not from the explosion. *Hobbs et al. v. The Northern Assurance Co.*, 343.

Fraudulent assignment of policy—Fraudulent preference.]—See FRAUDULENT CONVEYANCE, 2.

Life—Deduction from damages action for cause of death.]—See RAILWAYS AND RAILWAY COMPANIES, 7.

INTEREST.

Mortgage—Opening foreclosure—Terms—Interest on account found due per principal, interest, and costs by original decree.]—See MORTGAGE, 2.

JUDGMENT.

Jurisdiction—Declaratory judgment—Verbal agreement—Action to have same expressed in writing].—The plaintiff set up a verbal agreement made in 1873, between himself

and the defendant C., they being adjoining proprietors of land, to the effect that C. should build a house with its southern wall encroaching nine inches upon the plaintiff's land, and the plaintiff should be allowed at any time to use that wall as a party wall upon payment of half the expenses of its original erection by C.; and the plaintiff alleged that shortly afterwards C. erected his building as agreed upon, and the plaintiff claimed to have the agreement put into writing, and executed by C., so as to enable him to register it; and he asked a judgment declaring him entitled to all the rights and privileges contained in the verbal agreement. C. in his pleadings conceded the rights and privileges demanded by the plaintiff under the agreement.

Held, nevertheless, affirming the decision of FERGUSON, J., that the action must be dismissed, for there is no jurisdiction to ascertain and declare rights before a party interested has actually sustained damage. *Brooks v. Conley et al.*, 549.

Unproductive.]—See MUNICIPAL CORPORATIONS, 4.

JUDICATURE ACT.

Prevalence of equity—Relief from forfeiture—Covenant to pay taxes.]—See LANDLORD AND TENANT, 2.

Rule 351.]—See MORTGAGE, 2.

Rule 373.]—See ATTACHMENT OF DEBTS, 1.

JURY.

Qui tam action—Immediate return of conviction—Question for jury—New trial.]—See JUSTICE OF PEACE, 1.

JUSTICE OF PEACE.

*1. Immediate return of conviction—Action for penalty.]—In an action against two Justices of the Peace to recover a penalty for not making an immediate return of a conviction under R. S. O. ch. 76, *Held*, that it is a question for the jury whether, under the circumstances of any particular case, the return made is immediate, and that in a *qui tam* action the jury's finding for defendant should not be disturbed.*

In this case the conviction was made on the 31st of August, and the Magistrates withheld the return until the 15th of September, expecting to receive the fine every day, and intending to return it with the conviction. The jury having been directed to find whether this was not "reasonably immediate" returned a verdict for defendants, which was upheld. *Longeway qui tam v. Avison et al.*, 357.

LANDLORD AND TENANT.

Refusal by landlord to give possession—Measure of damages.]—Action by a tenant against his landlord for refusing to give him possession of the demised premises.

Held (WILSON, C. J., dissenting), that the proper measure of damages in such a case is the difference between what the tenant agreed to pay for the premises and what they were really worth. But it is not open to the tenant to shew that he rented the premises for the purpose of there carrying on a certain business, of which the landlord was aware, that he could not procure other premises, and to claim the profits which he might have made in such business if he had been let into possession.

Ward v. Smith, 11 Price 19, not followed; *Jacques v. Miller*, 6 Ch. D. 153, commented upon. *Marrin v. Graver*, 39.

2. *Forfeiture—Breach of covenant for payment of taxes—Judicature Act.*]—In actions to re-enter for breach of a covenant in a lease, the Court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect, in all cases where, under the former practice, the Court of Chancery would have relieved against the forfeiture.

Thus in the present case, where the plaintiff claimed to recover possession of certain lands leased by her to the defendant on the ground of breach of the covenant for the payment of taxes, which breach the defendant afterwards remedied before statement of claim filed. *Held*, that the action could not succeed.

The above is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a mere money payment. *Buckley v. Beigle*, 85.

3. *Lease—Landlord and tenant—Goods of third party—Right to dis-train.*]—C., having paid rent due by R. to H., in order to secure the sum so paid and other advances, took an assignment of the residue of the term from R., who forthwith took a lease from C., for a term of three months, the rental being the amount of C.'s advances to R.

Held, that such a lease, however binding between the parties, could not create the relation of landlord and tenant so as to enable C. to distrain the goods of third parties on the premises, the intention, as disclosed by the evidence set out below, being manifestly not to create such relation except as a scheme to en-

able C. to seize such goods. *Thomas v. Cameron et al.*, 441.

Claim to trade fixtures—Property in third party.]—See SALE OF Goods, 1.

LEASE.

1. *Lease—Parol agreement to vary—License—Right to revoke—Estopel by conduct.*]—The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain rough shelving, &c., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in.

Held, that the evidence of such agreement was not admissible, as it would add to the written agreement, and was not collateral thereto: but even if admissible, if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for

consideration and for a term certain could make no difference. It was held also that the evidence failed to establish the alleged agreement, and that the plaintiff was not estopped from denying it. *McKenzie v. Mc-Glaughlin* 111.

LIBEL AND SLANDER.

1. Defence, sufficiency of—Demurrer.]—Action against defendant for a libel on the plaintiff published in a newspaper, with regard to his conduct as a barrister and solicitor. The defence set up was, that the plaintiff had, for some time prior to the alleged defamatory publication, addressed open letters to the public through the public press, and had invited public attention to his (the plaintiff's) character and position as a solicitor and barrister, and had challenged public criticism upon his conduct in connection with the subject matters referred to in the said article, and such criticism so invited had been made in various newspaper articles and letters and correspondence from time to time immediately prior to the said article, and such article was a moderate expression of opinion thereupon, and in no way damned the plaintiff: and the defendant further said that the alleged libel and words were and formed part of an article printed and published in the said newspaper, and which said article was a fair and *bona fide* comment upon a matter of public and general interest, and it was printed and published *bona fide* and for the benefit of the public, and not otherwise, and without any malicious intent or motive.

Held, on demurrer, a good defence. *Macdonell v. Robinson*, 53.

2. Liable—Recovery of verdict against several—Subsequent action against others—Estoppel.]—A recovery of a verdict in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel. *Willcocks v. Howell et al.*, 576.

LICENSE.

Liquor license—Dominion and Provincial licenses.]—See TAVERNS AND SHOPS, 1.

LIQUOR LAWS.

License—Brewing—Dominion and Provincial licenses.]—See TAVERNS AND SHOPS, 1.

MASTER'S OFFICE.

Departure from record—Pleadings—Admissions.]—See STOCK, 1.

MECHANICS' LIEN.

1. Mechanics' lien—R. S. O. ch 120—Tenant with right of purchase—Right of lien holder to charge the landlord's interest.]—G. supplied bricks to W., who had leased certain land from H., with the right to purchase on certain terms. The contract for the supply of the bricks was made between G. and W., and on W.'s credit: although H. was aware that they were being supplied, and that a building was being erected on his property, and he had agreed to lend part of the money required for

the building to W. on the security of the property. W. did not exercise his right of purchase, and G. filed his lien against both W. and H., and brought an action to charge the land.

Held, that the interest of H. in the land could not be charged. *Graham v. Williams*, 47^r.

MEDICAL PRACTITIONER.

1. *Medical Act, R. S. O. ch. 142—Practising without registration—Unauthorized adjournment.*]—The defendant who was agent for dealer in musical instruments, undertook to cure one P. of cancer by friction and application of a certain oil, receiving as remuneration \$3 a visit, which he stated was for the medicine, being its actual cost. He admitted having practised in Germany, and that he imported the specific in question by the gross. It also appeared that he prescribed other medicine for the patient besides the oil. *Held*, that this was practising medicine, and that the defendant was rightly convicted of doing so for gain or hope of reward without registration under the Medical Act. The magistrate, on the 12th of November adjourned the case, by consent, for one week, for judgment, and against the protest of defendant's counsel, changed the day, and gave judgment on the 18th. *Held* that the conviction must be quashed. *Regina v. Hall*, 407.

2. *Ontario Medical Act, (R. S. O. ch. 142, sec. 40)—Erasure of name from register—Conviction—Distress for penalty—32-33 Vic. ch. 31, sec. 57 D.,—Evidence—Certiorari—Costs.*]—A conviction under the "Ontario Medical Act," (R. S. O. ch. 142, sec. 40,) for practising with-

out being registered, was quashed, because in default of payment of the fine imposed, distress was also awarded ; and, *Held*, that sec. 57 of ch. 31, of 32-33 Vic. D., does not apply as by sec. 46 of the Medical Act provision is made for enforcing payment.

Held, also, that sec. 40 applies to any person whose name has been erased from the register, though he may have practised after having been first registered.

Semble, that on a prosecution under the Act the defendant may shew that as a matter of law his name was on the register, though by accident or design improperly removed or erased therefrom.

Held, also, following *Regina v. Roddy*, 41 U. C. R. 291, that the defendant was properly rejected as a witness in his own behalf.

Quare, whether the right to a *certiorari* was taken away by an appeal to the Quarter Sessions.

The defendant was refused his costs, as the ground on which he had succeeded did not go to the merits. *Regina v. Sparham*, 570.

MORTGAGE.

1. *Assignment of mortgage—Purchase in trust for mortgagor—Statute of Frauds—Notice.*]—The plaintiff, who was mortgagee of certain lands, alleged that L., the present holder of the mortgage, purchased it from C. with knowledge of the fact that C. had purchased it from the original mortgagee as trustee for the plaintiff, who was to be allowed to redeem on paying whatever C. should pay for the mortgage, and a certain additional sum for C.'s services ; and sought to redeem on pay-

ment of what was due under the said agreement with C.

Held, that the above agreement fell within the Statute of Frauds, and should be evidenced in writing.

Held, also, that even if this were not so, L could not be affected by such agreement, having purchased without notice of it. *Wright v. Ley's*, 88.

2. *Opening foreclosure—New account—Interest on amount found due for principal interest, and costs, by original decree—Special order as to costs by Court of Appeal—Execution—Rule 321.]*—In a foreclosure suit a decree was made in November 1877, and a final order of foreclosure obtained in June 1878. In October, 1882, a petition was presented by the defendants to open the foreclosure, which was dismissed : 2 O. R. 348. The Court of Appeal reversed this decision, making an order to open the foreclosure on the usual terms of paying principal interest and costs, including the plaintiffs' costs of opposing the petition : 10 A. R. 99.

Held, affirming the decision of the Master-in-Ordinary, that the plaintiffs were entitled to interest on the whole amount of principal, interest, and costs, as found by the decree of November, 1877.

Held, also, reversing the decision of the Master-in-Ordinary, that the plaintiffs were not entitled to interest on the taxed costs of opposing the petition to open the foreclosure, for these costs were not recovered by force of the order made on the petition, which was reversed, but simply owing to the direction of the Court of Appeal.

Held, also, reversing the decision of the Master-in-Ordinary, that the

plaintiffs were not entitled to the costs of a writ of execution issued by them to recover their costs taxed under the order dismissing the petition, for the vacating of that order levelled the writ of execution, which was not part of the taxed costs of the petition but incurred subsequently. *Trinity College v. Hill et al.*, 286.

Dower in mortgaged lands—Absence of reconveyance—Extinguishment of mortgage.]—See DOWER, 1.

Assignment of—Right to part of money reserved to assignor—Right to sue.]—See CHOSE IN ACTION, 1.

Lands improperly included in first mortgage—Action by second mortgagee against assignee for value without notice of first mortgage.]—See REGISTRY LAWS, 2.

Gift of mortgage—Non-delivery—Donatio mortis causa.]—See DONATIO MORTIS CAUSA.

By executors—Innocent mortgagees—Will.]—See EXECUTORS AND ADMINISTRATORS, 1.

MUNICIPAL CORPORATIONS.

1. *Municipal corporations—Agreement with officer to account for fees received outside his office—Validity.]*—The plaintiffs appointed the defendant chief of police of the town of Stratford, at a named salary, but stipulated that he should act as county constable within the town only, and account for and pay over to the plaintiffs all fees received by him from the county as a reward for services performed by him as county constable.

Held, that under 5 and 5 Edw. VI. ch. 16, and 49 Geo. III. ch. 126, the agreement to account for such fees was invalid.

Quære, whether the plaintiffs, or the Board of Police Commissioners, had the power to appoint the defendant; and whether, apart from the statutes above mentioned, it was not *ultra vires* of the plaintiffs to bargain with the defendant for the accounting to them for the fees of another office not under their control. *Corporation of Town of Stratford v. Wilson*, 104.

2. *Municipal law — Railways—By-law granting bonus—36 Vic. c. 48, O., secs. 236, 248, 471, 474.]*

A by-law was introduced before the City Council of O., under 36 Vic. c. 48, O., on September 22nd, 1873, to grant a bonus of \$100,000 to aid in the construction of a certain railway, now represented by the plaintiffs, read a first time, considered in committee of the whole, reported with an amendment, and the clerk was directed to advertise it. Pursuant to such advertisement on October 16th, 1873, it was voted on by the electors and carried. On October 20th, 1873, the returns were presented to the Council, and the by-law was read a second and third time, and passed. Since, however, under s. 248, sub-s 3 of 36 Vic. c. 48, the by-law could only be taken into consideration by the Council after one month from the first publication in the newspaper, at a meeting of the Council, on November 5th, 1873, after the necessary time had elapsed, a motion to read the by-law a second and third time was proposed and lost. The by-law was by its terms to take effect on December 13th, 1873. On

April 7th, 1874, a motion was again made and carried at a meeting of the City Council, that the by-law passed by the ratepayers, having been passed by the Council previously to the time required by law, the same should be now read a second and third time. In the minutes of the Council the by-law referred to was mentioned as having been read a first time on October 20th, 1873, whereas the by-law in question was read a first time on September 22nd, 1873. Moreover the by-law thus voted on by the Council was said to come into operation and take effect on December 30th, 1873, whereas the one voted on by the electors was to take effect on December 13th, 1873.

The work on the railway to which the bonus was to be given began in August, 1872. In 1874 the contractors became insolvent, and from January, 1874, to February, 1881, no work was done, on which last date a new contract was made by the plaintiffs, under which the road was completed in September, 1882, and in November, 1882, a demand was made on the defendants, the city of O., for the debentures and refused. The plaintiffs now brought this action to enforce the by-law and the delivery to them of the debentures.

Held, that the by-law was bad, inasmuch as it was not in conformity with the provisions of 36 Vic. c. 48, s. 248.

Held, also, that subs. 4. of s. 471 of 36 Vic. c. 48, must not be construed as authorizing aid only to such railways as are mentioned in subs. 1 cf that section.

Quære, whether s. 236 of the statute does not require the by-law to be passed by the Council submitting

the same. *Canada Atlantic Railway Company v. Corporation of City of Ottawa et al.*, 183.

3. Bonus—By-laws—Irregularities—Formalities—Time within which bonus is payable—Municipal Act.] —The Montreal and City of Ottawa Junction R. W. Co. were incorporated in 1871 under an Act which provided that they should commence their road within three years and finish it within eight years. They commenced work in 1872, and while it was going on applied to the defendants for a bonus. The by-law granting the bonus was introduced to the council on September 22nd, 1872, and read a first time, the clerk was instructed to advertise it, and the votes of the electors were to be taken October 16th. The by-law as read for the first time had the date that it was to take effect on inserted as December 30th. The by-law as published and voted on by the electors had the date December 13th, (supposed to be an error of the printer.) The vote was taken October 16th, and the return thereof made to the council on October 20th, when the by-law was read the second and third time and passed. This passing of the by-law was discovered to be premature, as one month had not elapsed from its first publication, as required by 36 Vic c. 48, sec. 231, sub-sec. 3. On November 5th, when sufficient time had elapsed, a motion to read the by-law a second and third time was lost by a vote of seven to three. At a meeting of the council of the following year on April 7th, 1874, a motion was carried that the by-law be read a second and third time. Work was at that time being done on the road, and continued until January 1874,

when the contractors failed, and the and the work stopped. Nothing was done under the by-law, and no further work was done until February, 1881. The M. & C. of O. J. R. W. Co. was amalgamated with the C. & P. L. E. R. W. Co., under the name of the plaintiffs, by 42 Vic. ch. 57, D.

In an action by the plaintiffs to recover the benefit of the bonus, it was

Held, on appeal from the judgment of PROUDFOOT J., *ante p. 185*, dismissing such action :

1. That an Ontario municipality has power to grant a bonus to a railway company incorporated under a Dominion Act.
2. That an objection to a by-law that it was passed a few days less than a month after its first publication is not fatal, if it was passed after it was assented to by the electors.
3. That the omission (in the by-law as finally passed) of the clauses providing for voting for the time and places at which the votes were to be taken, would not invalidate it.
4. That the words "The council which submitted the same," in sec. 236 of the Municipal Act of 1873, do not mean the council of the particular year, but the council of the same municipality.
5. That the by-law should have complied with the terms of sec. 248, and as it shewed on its face that it was to take effect on December 13th, and the debentures to be issued under it were to be payable on December 29th, 1893 they were not payable within twenty years from the date of its taking effect ; but if the council had corrected this error from the 13th to the 30th on the

final passing, the Court would not interfere to quash the by-law on such an objection, which really made no difference in the liability of the rate-payer.—*Canada Atlantic R. W. Co. v. Corporation of City of Ottawa*, 201.

4. Municipal law—New municipality—Liability for share of debts created by old municipality—Payment to wrong person—Statute of Limitations—Unproductive judgment—36 Vic. ch. 48, secs. 9, 11, 27, 56, O.]—The township of E., the present plaintiffs, in 1873, passed a by-law for issuing debentures to raise \$6000, for the purposes of a certain school section, in part comprised in it, and in part in the township of G., and provided for payment of interest and creation of a sinking fund, and levying of the necessary special rate on the property of the school section. In 1874 the village of P. was incorporated out of a portion of the township of E., being a portion of the said school section, and during the currency of the debentures the corporation of P. collected their shares of the moneys, on the requisition of the secretary-treasurer of the school board, and paid over the same to that official, instead of to the treasurer of the township of E., which township never made any requisition on the village of P. to collect the moneys and itself paid over the moneys collected by it to the secretary-treasurer of the school board. In 1883 the said secretary-treasurer died, and it was found he had converted the sinking fund money to his own use, and had left no assets wherefrom it might be made good.

In the same year the debentures fell due, and the township of E. paid

them and now sued the village of P. for its *pro rata* share thereof.

Held, that having regard to 36 Vic. ch. 48, sec. 56, O. (R. S. O. ch. 174, sec. 55), the plaintiffs were entitled to judgment, except as to sums levied and received by the defendants more than six years before action brought, for the defendants should have paid the moneys over to the treasurer of the plaintiffs' corporation; and even if there had been a positive agreement by and with the township of E., that the money should be paid to the secretary-treasurer of the school board, this would have made no difference; for such an agreement would have been *ultra vires* the township of E., and void as contrary to the statute law, while the section of 36 Vic. ch. 48, relating to arbitrations in cases of separations of incorporated villages from townships, did not apply in this case, so as to prevent the action lying.

Held, also that even if it was impossible to make the judgment productive on the ground that the defendants could not now levy and collect the money, this was no reason why the plaintiff should not obtain judgment.

The Corporation of the County of Frontenac v. The Corporation of the City of Kingston, 30 U. C. R. 584, distinguished. *Township of Elderslie v. Village of Paisley*, 270.

5. By-law—Market—Conviction—Costs.]—A by-law required “All hay, &c., sold at the market or elsewhere in the town of Cornwall, which is required to be weighed by the vendor or purchaser, to be weighed with public weigh scales,” &c. A conviction under this by-law was, that defendant in contravention of said by-law brought hay into said

town, and had same weighed on scales other than the public scales.

Held, that the conviction was bad in not stating that the hay was sold at the market or elsewhere in said town, and must be quashed; and with costs to be paid by complainant the weighmaster, who had instituted the prosecution for his own benefit, after warning, instead of bringing an action in the Divisional Court. *Regina v. Hollister*, 750.

Ways—Roads opened up on lands adjacent to road allowance—Road allowance taken by owners of such lands—Right to open same up—Compensation—44 Vic. c. 241, secs. 15, 16.]—See HIGHWAYS, 1.

Adjoining municipalities—Corporation acting as agents—Trespassers—Damages.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

Injunction—Local improvement by-law not in public interest—Opening street.]—See INJUNCTION, 1.

Barb wire fence—Railways.]—See RAILWAYS AND RAILWAY COMPANIES, 6.

NEGLIGENCE.

In giving guarantee to Bank—Signing without reading—void contract.—See FRAUD AND MISREPRESENTATION, 2.

NEW TRIAL.

1. *New trial—When granted on weight of evidence—Bank manager—Authority of.]—On application for a new trial upon the weight of evidence, where there has been no mis-*

carriage in law, the question is does the verdict in the opinion of the Court do substantial justice; and, if not, is the evidence in their opinion sufficient to warrant interference?

In this case where the verdict rested entirely upon the plaintiff's testimony as opposed to that of two witnesses not interested, the Court were of opinion that the verdict did not do substantial justice, and a new trial was granted. *Grieve v. The Molsons Bank*, 162.

NEXT FRIEND.

Mulcted in costs for bringing action without proper investigation.]—See Costs, 1.

NOTICE.

On part of purchaser of mortgage of outstanding equity against vendor thereof.]—See MORTGAGE, 1.

PARENT AND CHILD.

Undue influence—Alleged final settlement with child.]—See FRAUD AND MISREPRESENTATION, 1.

PARTNERSHIP.

Lands as partnership property—Right of dower.]—See DOWER, 1.

Action for account and winding up—Judgment in.]—See FRAUD AND MISREPRESENTATION, 1.

PATENTS OF INVENTION.

1. Reissue—Infringement—Delay in seeking reissue—Selling manufactured articles in this country with statement upon it that it is patented in the United States.]—Held, that the delay (without any excuse) of a patentee for a period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a reissue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a reissue there), before the application for a reissue in this country, is fatal to the validity of the reissue here.

It is not illegal to manufacture and sell an article in this country which has been patented in the United States, and put upon it a statement that it is so patented, as a recommendation of it, so long as there is no infringement of a valid existing patent in this country. *Kidder et al. v. Smart et. al* *Kidder et al. v. Smart Manufacturing Co.*, 362.

2. Article patented in foreign country—Improvements—Original ideas—Employment of mechanic to make model—Enjoining manufacture under a patent obtained by him.]—The plaintiffs were the patentees of a certain invention in the United States, and being desirous of having the articles with some improvements patented in Canada, one of them employed one of the defendants, a mechanic, to make a model, and under the pledge of secrecy placed the United States patent in his hand and imparted to him his ideas as to the improvements. It was afterwards dis-

covered that the defendant so employed had, during his employment, taken out a patent for a similar article, under which he and the other defendants were manufacturing.

In an action brought to set aside this patent and for an injunction restraining the manufacture by the defendants of the article, it was contended on the latter's behalf, that the article was not protected in Canada by the United States patent and in fact that the idea was public property.

Held, following *Morison v. Moat*, 9 Ha. 244, that the plaintiffs had the right to succeed as to the injunction, and that their title was good as against the defendants, even though they might not have a good title against the public. *Lean v. Huston*, 521.

PERJURY.

Action on mortgage—Plea of judgment in former action—Replication of perjury—Pleading.]—See ACTION, 3.

PETITION.

Turning petition into action.]—See RAILWAYS, 4.

PLEADING.

Master's office—Departure from Admissions.]—See STOCK, 1.

Parties—Assignment of reversion—Chose in action.]—See SOLICITOR AND CLIENT, 1.

Action on mortgage—Plea of judgment in former action—Replication of paying—Pleading.]—See ACTION, 3.

Action on Covenant—Defence of fraud where defendant particeps criminis.]—See FRAUD AND MISREPRESENTATION, 3.

Statute of Frauds—Necessity of pleading it.]—See ASSESSMENT AND TAXES, 1.

POLICE MAGISTRATE.

1. *Information — Conviction — Reserving case for Superior Court — Removal by certiorari of proceedings — New trial — Constitutional law.]—*

Held, that a Police Magistrate cannot reserve a case for the opinion of a Superior Court under Consolidated Statutes of U. C. ch. 112, as he is not within the terms of that Act.

Held, also, that a defendant is not entitled to remove proceedings by certiorari to a Superior Court from a Police Magistrate or Justice of the Peace after conviction, or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the Court and no motion made to quash it. But, *Held*, that even had the conviction in this case been moved to be quashed, and an order *nisi* applied for upon the magistrate and prosecutor for a mandamus to the former to hear further evidence, which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the Court would not interfere.

The Court declined to hear discussed the question whether the Police Magistrate in this case, if appointed

only by the Ontario Government, was legally or validly appointed, as his appointment should have been by the Dominion, the Patent by the Ontario Government only being produced, and it not appearing that no commission by the Dominion had issued to him, nor that any search or enquiry had been made at the proper office as to the fact, the only other evidence as to the appointment besides the mere production of the Ontario patent, being the defendant's affidavit stating that the magistrate had no authority or appointment from the Crown or the Governor-General of the Dominion, and that he knew this "of common and notorious report."

Held, also, that the information in this case was not objectionable for not setting out the false pretences of which the defendant was convicted, as it was in the form in which an indictment might have been framed: and moreover, the objection was met by the 32-33 Vic. ch. 32, sec. 11, (D.) and by 32-33 Vic. ch. 31, sec. 67, (D.) *Regina v. Richardson*, 651.

POUND-KEEPER.

Replevin will not lie against.]—See REPLEVIN, 1.

POWER OF SALE.

Will—Adverse possession of executor with power of sale.]—See WILLS, 2.

In will—Conditional gift on devisee remaining sober — Uncertainty.]—See WILL, 7.

PRACTICE.

Master's office—Departure from record—Pleadings—Admissions.]—See STOCK, 1.

PRINCIPAL AND AGENT.

Municipal corporation as agents for other corporations—Liability as wrong-doer.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

Agent contracting as owner—Principal's right to enforce contract.]—See CONTRACT, 1.

PRINCIPAL AND SURETY.

Giving time on principal debt.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

QUARTER SESSIONS.

Effect of appeal to on right to certiorari]—See MEDICAL PRACTITIONER, 2.

RAILWAYS AND RAILWAY COMPANIES.

1. Subway, construction of—Corporation—Acting as agents—Trespassers—Damages.]—The judgment of WILSON, C. J., p. 270, affirmed on appeal to the Divisional Court, and the village of Parkdale held liable for damages done to the plaintiff's land by the construction of the subway for Railways under Queen street.

West v. Parkdale et al., 59. Carroll v. Parkdale et al., 59.

2. Railways—Sleeping cars—Loss on—Liability—Negligence.]—The plaintiff was a passenger on one of defendants' cars occupying a sleeping berth. Before going to sleep he had undressed himself and had put his pocket book containing his money in his trousers' pocket, rolling up his trousers and putting his suspenders round them, and then placed them under his pillow next the wall. When he was called before arriving at his place of destination, he discovered that his pocket book and money were gone. No negligence in the defendants was shewn.

Held, that no liability attached to the defendants. Stearn v. Pullman Car Company, 171.

3. An Ontario municipality has power to grant a bonus to a railway company incorporated under a Dominion Act. Canada Atlantic R. W. Co. v. Corporation of the City of Ottawa et al., 201.

4. Dominion Railway Act, 1879—Appeal from award—Jurisdiction—Changing petition into action—R. S. O. c. 165, s. 20—42 Vic. c. 9, D.]—An appeal on petition will not lie from the award of arbitrators appointed under the Dominion Railway Act, 1879, 42 Vic. c. 9, D. The only mode of impeaching such an award is, by an action to set it aside; or else to make the submission a rule of Court, and then move to set it aside.

The appeal given by R. S. O. c. 165, s. 20, sub-s. 19, only applies to railways over which the Provincial Legislature has jurisdiction, and is not available in such a case as the above.

Sembler, the Court has no power to turn such a petition as the present

into an action. *Re Lea and the Ontario and Quebec R. W.*, 222.

5. Railways and railway companies—Power to convey lands—Estoppel—Ejectment—Statute of Limitations.]—*Held*, that the Grand Trunk Railway Company, under 14 and 15 Vic. ch. 51, had no power to convey or alienate lands; and certainly not lands acquired by them for the purposes of the railway, and which were necessary for its construction, maintenance, and accommodation.

Quare, as to such power under Consol. Stat. Can. ch. 66, sec. 9, subsec. 2.

As the deed from the company was not shewn to contain any covenant.

Held, in ejectment against them, that they were not estopped; and

Quare, whether, in any case, they could be estopped in such an action. *Pratt v. Grand Trunk R. W. Co.*, 499.

6. Barbed wire fence—Injury therefrom—Non-liability for—Rejection of evidence of common user.]—*Held*, O'CONNOR, J., dissenting, that in face of 46 Vic. ch. 18, sec. 490, sub-secs. 15, 16 (O.), which seemed to sanction them, and empower municipalities to provide against injury resulting from them, barbed wire fences, constructed by the defendants upon an ordinary country road along the line of their railway, could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case having been passed respecting fences of the kind; and that the defendants were not, therefore, liable for the loss of the plaintiff's colt which, while following its dam, as the latter was being led by

the plaintiff's servant, ran against the fence and received injuries resulting in its death.

Held, also, that the colt in question, five weeks old, following its dam, could not be said to be running at large, the universal custom of the country, which ought to govern, being for colts thus to follow the dam.

Held, also, that evidence of the common use of fences of the kind in other townships, and that other municipalities held out inducements to erect them, should not have been rejected, as shewing that they were not considered dangerous or a nuisance. *Hillyard v. Grand Trunk R. W. Co.*, 583.

7. Track crossing not fenced—Unlawful rate of speed—Accident—Contributory negligence—Common law liability—Life policy—Deduction from damages.]—The plaintiff's husband was driving in his wagon along the highway, in the town of Strathroy, where it crossed the defendants' line of railway, which was there unfenced. As he approached the track he did not observe any stir among the railway employees or others there, or any other signs indicating the approach of an expected or coming train. There was a curve in the line about a mile to the west, beyond which a train could not be seen, and there was strong evidence that the view which he might have had for some distance westward was obstructed partly by cars placed by the railway employees on the side tracks and partly by a baggage house and other obstructions, so that he could not see far enough to enable him to avoid a train running at the rate of thirty-five miles an hour, as the defendants' train was at the time. The

train in question was a fast train, but recently established, which there was no direct evidence that he had ever seen passing through the town, or that he knew of. There was apparently credible evidence that after the locomotive came within hearing distance there was no sound of bell or whistle until it was so near the crossing that there was only time for two short sharp whistles, when the collision with the wagon took place, which caused the death of the plaintiff's husband and the destruction of both horses and wagon. The alleged obstructions and the neglect to ring the bell or sound the whistle were strongly controverted by defendants' witnesses, though the evidence for the defence rather corroborated the plaintiff's witnesses in those respects. *Held*, that it was altogether a case for the jury, and as it was fairly presented to them and upon questions fairly put to them, which they had answered, finding in the plaintiff's favour, the Court would not interfere with their verdict. *Held*, also, that there was no contributory negligence on the part of the deceased.

Per O'CONNOR, J., that the defendants were under the circumstances appearing, not only liable in damages, but to a criminal prosecution as well.

Per O'CONNOR, J., that the Consol. R. W. Act 1879 (42 Vic. ch. 9 (D.) as to the ringing of the bell and sounding the whistle, does not apply to the Great Western Division of the Grand Trunk R. W., but that that division of the railway still remains liable to sec. 144 of Consol. Stat. Can. ch. 66, restricting the rate of speed to six miles an hour of locomotives passing through any thickly peopled portion of any city,

town, or village, where the track is not properly fenced.

Per WILSON, O. J., that independently of any statutory enactment the defendants were running their train too rapidly for the public safety at the place in question, and they must be governed by the same rules as ordinary vehicles and teams using roads which meet and cross each other, and which, while providing each for its own safety, must also provide for that of the others, and each having the same but no higher rights and privileges than the others.

Held, also, [WILSON, C.J., dissenting,] that a policy of insurance for \$3,000 on the life of the deceased had been improperly directed by the learned Judge at the trial to be deducted from the damages assessed by the jury.

Per WILSON, C. J., that the whole amount of such policy should be deducted; but, in any event, such deduction should be made as would represent the probable premiums payable had the deceased lived, as also the interest upon such premiums. *Beckett v. Grand Trunk R. W. Co.*, 601.

Receiver — Amalgamation.] — See RECEIVER, 1.

RECEIVER.

1. *Railway — Amalgamation — Receiver*—44 Vic. ch. 69, O.]—The plaintiff, on behalf of himself and all other creditors of the P. D. and L. H. railway company, brought this action against that company, upon a judgment obtained by him against it, and claimed the appointment of a receiver. After the commencement of this action the P. D. and L. H. company was by 44 Vic. ch. 69, O.,

which came into force on March 4th, 1881, amalgamated with two other railways under the name of the L. E. railway company, and by the Act it was provided that the assets of each of the constituent railways should respectively continue liable to satisfy all claims against each of the said railways, so amalgamated, and the future assets of the L. E. company should be applicable to satisfy claims against each of the constituent railways respectively, in the proportion that the line of the particular company against which a claim existed, bore to the whole line, but the assets of one company were not to be applied to satisfy claims against another, and all claims were to be postponed to the claims of bondholders of bonds issued under the provisions of the Act. The plaintiff, thereupon, amended his claim, and asked for a receiver to receive the revenues, profits, and income, of the portion of the L. E. railway, formerly belonging to the P. D. and L. H. railway company. On April 22nd, 1881, the L. E. railway company entered into an agreement with the G. T. railway company, which had since been acted upon, whereby the L. E. company agreed to mortgage a certain portion of its line to secure an issue of first and second mortgage bonds, which were to be apportioned among the various constituent railways, and to be applied as therein specified, and the G. T. railway was to have possession and work the L. E. line for twenty-one years, and to pay as the L. E. company should direct, 25 per cent. of the gross receipts, and the G. T. company was to keep and deliver to the L. E. company half-yearly accounts of the receipts of the line from all sources. There were, also, certain provisions for securing

the payment of interest on the above mentioned mortgage bonds, though it was admitted that the sums paid since the agreement, had not been sufficient to pay such interest.

Held, that, under the circumstances, it was not proper to appoint a receiver, for it was not a case in which, when all things were considered, it could be said that any good could probably result from such appointment. *Smith v. Port Dover and Lake Huron R. W. Co.*, 256.

REGISTRY LAWS.

1. *Registration—Will—Omission to enter in abstract index—Search by assignor—Right to benefit of by assignee.]*—A will relating to certain land, though registered, was not entered on the abstract index, whereby the plaintiff claimed he was damnified in purchasing a mortgage on the land, the mortgagor having no title. The mortgage was first purchased by S., a solicitor, for himself, and the assignment of it made to the plaintiff, for whom he was accustomed to act, and to whom he afterwards sold. S. was not retained by plaintiff to search the title for him; it was not searched when he sold to the plaintiff; and the learned Judge before whom the case was tried held that he relied on the supposed title acquired by the mortgagor by possession.

Held, that the plaintiff could not claim that he was damnified by defendant's omission; and that he could find no action on the search made by S. *Green v. Ponton*, 471.

2. *Lands improperly included in first mortgage—Action by second mortgagee against assignee for value*

without notice of first mortgage—Defence—Registry Act, R. S. O. ch. 95, sec. 8.]—Y. being the owner of certain land, mortgaged it with other lands to the M. P. B. Society by mortgage, dated July 12th, 1873, registering July 14th, 1873. Subsequently being desirous of selling part and paying off the mortgage and getting a new loan, he, by an agreement in writing, arranged with the society to leave the mortgage standing, take a further loan of \$700, and have certain of the lands (of which the lot in question was part) released by the Society. A second mortgage for the \$700 advance was prepared and executed dated February 1st, 1875, registered February 11th, 1875, which by mistake as was alleged included all the lands in the first mortgage; and a release dated February 9th, 1875, was duly executed by the Society releasing the lot in question from the operation of the mortgage of July 12th, 1873, and was afterwards registered March 20th, 1876.

B., the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question, which should have been omitted, loaned Y. certain moneys, and took a mortgage dated May 21, 1877, registered June 6th, 1877, to secure the payment thereof. The Society assigned the second mortgage and all moneys secured thereby to the defendants by assignment dated March 1st, 1880, registered January 17th, 1881, and by deed dated March 1st, 1882, registered June 2nd, 1883, Y. conveyed his equity of redemption to B.

In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to B., it was held (affirming the judg-

ment of Ferguson, J.) That the combined operation of R. S. O. ch. 111, s. 81, and R. S. O. c. 95, s. 8, formed a complete defence, and that the defendants as assignees of the mortgage for value, having the legal estate, might defend as purchasers for value without notice, and claim also the protection of the Registry Act, as against the plaintiff a subsequent purchaser or mortgagee from the original mortgagor.

Semble that even as against the mortgagor the defendants would also be entitled to prevail. *Bridges v. Real Estate Loan and Debenture Co.*, 493.

Discharges of mortgage—Reconveyance—R. S. O. c. 111, s. 67.]—See DOWER, 1.

REPLEVIN.

Pound-keeper—Constable—Notice of action.]—Replevin will not lie against a pound-keeper. In this case the sheep which were impounded were grazing upon an open common with the consent of the owner thereof, and were being herded by a boy in charge of them with a view to driving them home, when they were taken possession of by two constables, against the boy's remonstrance:

Held, that the sheep were not "running at large," in contravention of a by-law of the municipality on the subject, and that the constables were liable in replevin for impounding them; but that replevin would not lie against the pound-keeper.

Held, also, that the constables were not entitled to notice of action.

Per O'CONNOR, J.: because although they were public officers, it was no part of their duty as such

officers to distrain and impound the sheep, even if they were "running at large" contrary to the by-law; they were merely "other" persons, who under the by-law were empowered to take and deliver to the pound-keeper.

Per Wilson, C. J., unless some facts existed which might give rise to an honest belief that the sheep were at large, and unless they honestly believed that such a state of things existed, they were not entitled to notice of action, but such a state of facts did not exist under the evidence in this case. *Ibbotson v. Henry*, 625.

RIVERS AND STREAMS.

Streams—Improvements on for floating timber—Right to the use of.]—The plaintiff had erected dams, slides, and other improvements for facilitating the passage of saw logs and timber down a stream, floatable in a state of nature. Some of these slides were situated in the bed of the stream, others were built entirely on the plaintiff's land on one side of the stream, the water of which was dammed back so as to flow in part through the artificial channel thus constructed. The defendants in driving their logs and timber down the stream used all the slides and improvements. In an action for tolls for such user—

Held, following *Caldwell v. McLaren*, L. R. 9 App. Cas. 352, that as to all slides and improvements constructed in the bed of the stream plaintiff could not recover; but *Held*, also, as to all such improvements outside the channel, and upon plaintiff's land, that a recovery by the plaintiff was proper.

Held, also, that the absence of aprons of the proper statutable dimensions upon plaintiff's dams across the river afforded defendants no ground for claiming the right to use without compensation plaintiff's improvements not in the bed of the stream.

Boale v. Dickson, 13 C. P. 337, remarked upon. *Mackey v. Sherman*, 28.

ROAD ALLOWANCE.

Roads opened up on lands adjacent to road allowance—Road allowance taken by owners of such lands—Right to open up same—Compensation—44 Vic. c. 241, secs. 15, 16.]—See HIGHWAYS, 1.

SALE OF GOODS.

1. *Sale of goods—Property passing—Landlord and owner—Trade fixtures.]*—In July, 1882, the plaintiff sold to U. & Co. certain water-wheels under a written agreement whereby, until the whole purchase money was paid, the title and property should not pass but merely the right of possession, which should be forfeited on default of payment, or on the goods being seized under distress or execution, &c., the sale being conditional and punctual payment being essential to it. The wheels were received by U. & Co., and were placed, but so as to be capable of being taken out by the removal of a few boards and expenditure of a few dollars, in a flume attached to a mill erected by them on land, with water privileges, occupied under a written agreement for a lease made with H., which provided that the lease should contain provisions for forfeiture in the event

of bankruptcy or non-payment of rent, or of non-performance of covenants. A lease was drawn up but was never executed. In February, 1883, the sheriff, under a *f. fa.* goods, seized the chattel property but not the wheels. About the same time U. & Co. voluntarily gave up possession of the premises and delivered the key to H. In March, U. & Co.'s interest in, amongst other things, the wheels was sold to S., under proceedings to realize the amount of certain mechanics' liens. Subsequently the lease and all the property of U. & Co. became vested in the defendants, the Ontario Pulp Co. Default having been made by U. & Co. to the plaintiffs, they in January demanded the wheels, and, on defendants refusal to deliver them up, claiming them as their own, the plaintiffs brought this action to recover their value.

Held, that had the wheels belonged to U. & Co they would now be defendants' property, for being trade fixtures, by the effect of the forfeiture or surrender of the term and change of possession, they would have become the landlord's property; but that the wheels never ceased to be anything else but chattels, and the property in them never passed to U. & Co.; and the plaintiff having demanded them before the surrender was therefore held entitled to recover their value. *The Joseph Hall Manufacturing Co. v. Hazlitt et al.*, 465.

SALE OF LANDS.

By railway, of lands necessary there-to—Invalid conveyance.]—See RAILWAYS, 5.

100—VOL. VIII O.R.

Agreement for joint purchase at the sale—Illegality.—See ASSESSMENT AND TAXES, 1.

Conveyance by wife alone—Absent husband.]—See HUSBAND AND WIFE, 2.

Notice of outstanding equity against of mortgage.]—See MORTGAGE, 1.

SHELLEY'S CASE.

Rule in.]—See WILL, 10.

SHIPPING.

Registered owner of vessel—Evidence of being mortgagees merely—Action for goods supplied—Liability.]—See ACTION, 1.

SOLICITOR AND CLIENT.

Solicitor and client—Security for costs incurred—Misdirection—Adding parties—Assignment of reversion Future action—Chose in action.]—D. being indebted to the plaintiff for costs in some suits and other matters, by an instrument not under seal assigned to him a lease of certain premises made by D. to defendant, together with all rent in respect of said lease and the term thereby created. In an action to recover from defendant the rent which accrued due after the making of the assignment, the learned Judge charged the jury that while plaintiff remained D.'s solicitor he could not take any security for his benefit, and that he should have disengaged the connection between them, and let D. have independent legal advice.

Held, misdirection, for that the assignment, if not invalid in other respects, was valid so far as it was a security for costs already incurred.

Held, also, that D. was not a necessary party.

Quare, whether the assignment should be treated as of the reversion or of future rent accruing out of the land, and so void as not under seal; or as an assignment of a chose in action, namely, of the moneys payable under the covenants of the lease, and so valid.—*Galbraith v. Irving*, 751.

STATUTE OF FRAUDS.

Guarantee—Form of—How sent and received—Names of Parties.]—In an action for the price of goods supplied by the plaintiffs to C. A. E., it was proved that the plaintiffs received in an envelope, addressed to their firm, the following letter:—

“LAKE SUPERIOR, ONT.,
“JULY 4th, 1883.

“GENTLEMEN,—I beg to inform you that I have assumed all liabilities of the S P. Co. lately carried on by Mr. C. A. E., and am responsible to the amount contracted by him up to June 24th, 1882.

“Kindly ship chases immediately.
“Respectfully yours,
(Signed) “C. J. S.”

The envelope was lost, but its receipt and the address on it were proved.

Held, a sufficient agreement in writing to satisfy the statute for that the address on the envelope referring to the “gentlemen” within showed that the plaintiffs were the persons guaranteed. *Richards et al. v. Stillwell*, 511.

Deed incomplete as conveyance—Sufficient memorandum of contract.]—See CONTRACT, 1.

Sufficiency of memorandum—Signature by initials—Memorandum on margin of Gazette of lands bought at tax sale.]—See ASSESSMENT AND TAXES, 1.

Agreement by purchaser of mortgage with original mortgagor as to redemption thereof—Subsequent purchaser.—See MORTGAGE, 1.

STATUTE OF LIMITATIONS.

Possession by the Crown.]—See TAX SALE, 2.

STATUTES OF MORTMAIN.

Will—Mortmain Acts—Charity—Impure personality—Attempted ratification by heir of void bequest to charity.]—H. S., by his will, bequeathed certain pure and impure personality to the London City Mission, a charitable organization, and died in 1865. In 1866 A. S., his heiress and next of kin, sent a signed writing to the executor of the will, in which, after reciting that doubts might arise whether the impure personality passed to the executor in trust for the charity, she declared her acquiescence in what she said she knew had been the testator's intention, viz., that the whole of the personality, pure and impure, should be treated by the executor as so passing to him, and renounced her rights thereto, and requested the executor to treat it all as so passing. In May, 1870, A. S. made a will devising and bequeathing all her real and personal property on certain

trusts. In July, 1870, she informed the executor of H. S. that she had changed her intentions as to the matter referred to in the writing of 1866 above mentioned, and she forwarded another will, dated July, 1879, in which she bequeathed all the property she had as heiress and next of kin to H. S. to J. R., and appointed the same person her executor as was executor of the will of H. S. J. R. died before A. S. In 1869, and in March, 1870, A. S. had written letters to the secretary of the London City Mission, in which she had expressed her intention of carrying into effect the intentions of H. S., as expressed in his will. A. S. died in 1877, and probate of her first will of May, 1870, was granted to the executors named in it.

Held, that the impure personality could not pass by the will to the London City Mission, and the writing of 1866 and the letters to the London City Mission did not amount to such an assignment of it as would pass it to the charity inasmuch as the requirements of the Mortmain Acts were not complied with : that a gift by will of property that failed to take effect by reason of the Mortmain Acts, could not be aided or set up by the party entitled to the property by anything less than what would be required to constitute a good gift by such party of the same property to the party intended to be benefited by the gift in the will.

There can be no marshalling of assets in favour of a charity.

As to the two wills of A. S., the bequest to J. R. by the second will lapsed by reason of her death before that of H. S., and the subject of it fell into the estate of A. S., so as to pass under the former will. *Becher v. Hoare et al.*, 328.

STATUTES.

5-6 *Edw. VI. c. 16.]—See MUNICIPAL CORPORATIONS, 2.*

49 *Geo. III. c. 126.]—See MUNICIPAL CORPORATIONS, 2.*

59 *Geo. III. c. 7.]—See TAX SALE, 2.*

6 *Geo. IV. c. 7.]—See TAX SALE, 2.*

14-15 *Vic. c. 51.]—See RAILWAYS, 4.*

C. S. C. c. 66, s. 9, sub-sec. 2.]—See RAILWAYS, 4.

C. S. C. c. 66, s. 144.]—See RAILWAYS AND RAILWAY COMPANIES, 6.

C. S. U. C. c. 112.]—See POLICE MAGISTRATE, 1.

32 *Vic. c. 36, s. 9, 128.]—See ASSESSMENT AND TAXES, 2.*

32-33 *Vic. c. 31; s. 46.]—See MEDICAL PRACTITIONER, 1.*

32-33 *Vic. c. 31, s. 57, D.]—See MEDICAL PRACTITIONER, 2.*

32-33 *Vic. c. 31, s. 67, D.]—See POLICE MAGISTRATE, 1.*

32-33 *Vic. c. 32, s. 11, D.]—See POLICE MAGISTRATE, 1.*

35 *Vic. c. 16, s. 1, O.]—See CONTRACT, 2.*

35 *Vic. c. 104, D.]—See COMPANY, 2.*

35 *Vic. c. 18, s. 3, O.]—See CONTRACT, 2.*

36 *Vic. c. 48, ss. 9, 11, 27, 56, O.]—See MUNICIPAL CORPORATION, 2.*

36 *Vic. c. 48, s. 236, 248, 471 (O.)]—See MUNICIPAL CORPORATIONS, 3, 4.*

42 *Vic. c. 9, D.]—See RAILWAYS AND RAILWAY COMPANIES, 6.*

44 *Vic. c. 69, O.]—See RECEIVER, 1.*

44 *Vic. c. 241, ss. 15, 16, O.]—See HIGHWAYS, 1.*

45 *Vic. c. 23 D.]—See COMPANY, 1.*

45 Vic. c. 23, s. 75.]—See CORPORATIONS, 4, 6.

46 Vic. c. 18, s. 490, sub-sec. 15, 16, O.]—See RAILWAYS AND RAILWAY COMPANIES, 5.

46 Vic. c. 18, s. 545. O.]—See HIGHWAY, 2.

R. S. O. c. 62, s. 10.]—See FRAUD AND MISREPRESENTATION, 1.

R. S. O. c. 76.]—See JUSTICE OF PEACE, 1.

R. S. O. c. 95, s. 8.]—See REGISTRY LAWS, 2.

R. S. O. c. 106, s. 7, seq.]—See WILL, 1.

R. S. O. c. 107, s. 7, 17, 20]—See EXECUTORS AND ADMINISTRATORS, 2.

R. S. O. c. 107, s. 19.]—See WILL, 3.

R. S. O. c. 107, s. 35.]—See WILL, 7.

R. S. O. c. 108; s. 30.]—See WILL, 2.

R. S. O. c. 111, s. 67.]—See DOWER, 1.

R. S. O. c. 111, s. 81.]—See REGISTRY LAWS, 2.

R. S. O. c. 118, s. 2.]—See FRAUDULENT CONVEYANCE, 1.

R. S. O. c. 119, s. 1, 2.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

R. S. O. c. 120.]—See MECHANICS' LIEN, 1.

R. S. O. c. 125, s. 19.]—See CONTRACT, 2.

R. S. O. c. 142.]—See MEDICAL PRACTITIONER, 1.

R. S. O. c. 142, s. 40, 46.]—See MEDICAL PRACTITIONER, 2.

R. S. O. c. 150.]—See COMPANY, 3.

R. S. O. c. 165, s. 20, sub-sec. 19.]—See RAILWAYS, 3.

R. S. O. c. 174, s. 55.]—See MUNICIPAL CORPORATIONS, 4.

R. S. O. c. 180, s. 93, 127.]—See ASSESSMENT AND TAXES, 2.

STOCK EXCHANGE.

Member becoming insolvent or bankrupt—Meaning of—Removal of member's name from list—Legality of.]—See CORPORATIONS, 6.

STOCK.

Pleadings—Admissions—Master's office—Departure from record—Pledge of stock—Ear-mark—Identification of pledged stock.]—In his pleadings, in an action for an account the plaintiff set up that on April 23rd, 1878, he transferred to the defendant 160 shares of a certain bank, as a security for a loan, and that pending the loan the defendants had sold the said stock and realized more than the indebtedness, whereof he claimed an account, and the parties went to trial on admissions that the bank stock was in the defendants' hands at the said date. In the Master's Office the plaintiff sought to raise an issue as to whether the defendants actually did hold the bank stock on that date, or whether, having held it previously as security for another loan, they had not parted with it before the said date, and falsely represented to the plaintiff that they were not liable to be charged with its market value as of that date.

Held, affirming the decision of the Master in Ordinary, that the plaintiff could not be allowed thus to set up a different state of facts and cause of action from that spread upon the record.

Sensible, that inasmuch as it appeared that the defendants held at the date of the loan 160 shares of the bank in question; and inasmuch as the particular shares were not

identified or ear-marked in any way, it could not be considered proved that the defendants had not 160 shares applicable to the plaintiff's loan on the date in question.—*Carnegie v. Federal Bank of Canada*, 75.

Subscription in stock before incorporation of company—R. S. O. ch. 150—*Non-liability for calls*.—See CORPORATIONS, 3.

SHARES.

Laches—Delay in consummating transfer of shares on books of company—Contributory—45 Vic. c. 23, D.]—See CORPORATIONS, 1.

Evidence of being a shareholder—Absence of formal acceptance—Admission of ownership.—See CORPORATIONS, 2.

TAVERNS AND SHOPS.

Brewers—License.]—The defendant, a brewer licensed to manufacture ale, &c., at Palmerston, under a Dominion license, had a cellar or vault at Brantford, where he stored such ale, &c., and sold it in quantities not less than allowed to be sold by wholesale. Held, that the sale was authorized under the Dominion license, and that a Provincial license was not required. *Regina v. Young* 476.

TAX SALE.

Taxsale—Lands granted by Crown by mistake—Surrender—Possession—Statute of Limitations—Equity as against Crown.]—In 1808 an order in council was passed for a grant of

land to W., the daughter of a U. E. Loyalist. In 1818 certain land was located thereunder, and a patent issued therefor. In 1819 W. petitioned the Governor-in-Council, stating that this was by mistake, and without any authority from her; and in 1820 an order in council was passed allowing her to surrender the land, and to locate other land in lieu thereof. In 1820, before the surrender, the surveyor-general furnished the treasurer with a list of lands in this district, specifying this lot as deeded to W. The land was thereupon assessed, and in 1831, having been returned by the treasurer to the sheriff as in arrear for the taxes for the years 1820-9, and liable for sale, it was in that year sold to S., and a tax-deed given in 1832. In 1839 S. conveyed to N., who in 1840 conveyed to G., through whom the plaintiff claimed. In 1839 N. petitioned the Governor-in-Council, stating that he was the assignee of the tax-purchaser: that he had discovered that the surveyor-general's return was an error, the land having been surrendered, but that under the circumstances the tax-sale was regular, and that it should be confirmed, and a patent issued to him. In 1840 an order in council was passed, stating that if N.'s tax-title was valid he did not require a patent, but if not, the Government had no power to make a free grant of the land. In 1868 the Crown granted the land to H., who conveyed to the defendant

Held, that as under 59 Geo. III. ch. 7 and 6 Geo. IV. ch. 7, only lands granted by the Crown were to be liable to assessment and sale, and as, under the circumstances, the lands never passed out of the Crown and vested in W.—the formal surrender being taken rather as a precaution-

ary than as a necessary act, and the mistake of the surveyor-general in not giving notice of the surrender could not make the land liable to be sold for taxes as against the Crown—the tax-sale was invalid, and nothing passed under it; and that the defendant, claiming under the subsequent patent, was entitled to the land.

Per Rose, J.—If any title vested in W. the surrender was ineffectual as a conveyance to divest it; but that in such case the action of W. in applying for and obtaining another grant of land created an equity in the Crown, entitling it to the possession and disposal thereof, and, as against W., at all events, the possession was in the Crown immediately on the surrender.

Quære, whether, as the Crown had been in possession since 1820, the plaintiff would not be barred by the Statute of Limitations.

Quære, also, whether the plaintiff had any claim against the Crown for the moneys paid at the tax-sale; at all events after the tax sale the parties dealt with the land with notice of the difficulties that existed. *Moffatt v. Scratch*, 147.

Agreement for joint purchase—Illegality.]—See ASSESSMENT AND TAXES, I.

TRUSTEES.

1. *Power of one to bind other by lease—Easement—Acquiescence.*]—The trustees of M., deceased, who held the legal estate in land in trust for sale for the purpose of a reservoir, sold to one Z. in 1854, a portion of lot ten, Niagara Falls Survey, for the purpose of a reservoir, the intention being

to run a line of pipes over the residue of said lot to Niagara Falls, where a pump-house was to be constructed for the purpose of forcing the water to the reservoir, and thence it was to be distributed by pipes over the town of Niagara Falls. T. B., as well as E. B. M., the acting trustee, agreed to extend this lease for ever at a rental to be fixed every twenty-one years. The trustees subsequently sold the land in question to S. B., son of T. B., whose place, it was understood, S. B. was to take, T. B. having the right of purchase under his lease, and having expended large sums in improving the property. S. B. subsequently mortgaged to a certain company, who sold under foreclosure proceedings to the plaintiff. The land through which such pipes were to run had been devised by one M. to E. B. M., his wife and three others as trustees. In 1854 E. B. M. alone leased it to T. B. for fourteen years. In 1854 T. B. leased a strip 8 feet wide by 650 feet long to Z., for the purpose of laying his pipes therein, for ten years, at a nominal rent, and both T. B. and E. B. M., in that year, by separate instruments, covenanted with S. B. that she or T. B., if he should purchase the land under a provision in his lease for that purpose, would continue the lease to Z. for twenty-one years, perpetually renewable, at a rent, a rent to be fixed by arbitration. Z. constructed the reservoir, &c., and laid down the pipes in 1854, and the town had been supplied by them ever since. In 1864 E. B. M. gave a further lease to T. B. for seven years, and in 1868 she conveyed to S. B., the appointee of T. B., his father. S. B. mortgaged to a loan company, who sold under a decree for sale to the

plaintiff, stating in the advertisement that it was subject to the right of the defendants, who represented Z. to lay their water-pipes under the lease from T. B. to Z. After the expiration of that lease no further lease had been executed, but \$12 a year was, by agreement, paid as rent to T. B. and to S. B. until the title became vested in the plaintiff, who refused to accept rent or to recognize the defendants' rights, and brought trespass against them.

Held, 1. That the lease of 1850 by E. M. B. alone was not binding on her co-trustees unless they could be shewn to have agreed to it.

2. That the right of Z. to get a lease from T. B., under the covenant of 1854, continued as against T. B. under the second lease of 1864.

3. That the defendants having, under the covenants of T. B. and E. B. M., taken possession and constructed the works, which were of a permanent and expensive character, and for the public benefit, and having paid rent up to the time of the plaintiffs acquiring title, and all parties having had notice, and made no objection; they were entitled to an injunction staying the action, and to a lease for twenty-one years, renewable at a rent to be fixed by arbitration or by the registrar of the Court. *Davis v. Morris*, 1.

— TRUSTS AND TRUSTEES.

Trust for maintenance—Duration thereof.]—See WILL, 1.

— WILL.

1. *Will—Construction—Trust for maintenance and education—Duration thereof—“Steadiness.”]—A tes-*

tator by his will, dated May 31st, 1872, after several specific bequests, gave the residue of his real and personal estate to his trustees upon trust to pay to each of his daughters, J. and L., for life, the annual allowance of \$800 each, which they were then receiving, to be paid to them semi-annually, and to pay for the education, maintenance and ordinary requirements of his son G., and then proceeded: “And I direct my trustees in their discretion, if they find my son G. deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate, and if my said trustees are satisfied as to his steadiness they are to treat my said son G. in respect to the said allowance in the same manner as my said daughters, J. and L.,

* * * It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct.”

Held, that George was only entitled to his maintenance and education during minority, for there was nothing in the will to indicate an intention to extend the trust for maintenance and education beyond that period.

Held, also, that George was not entitled to any annual allowance in addition to his maintenance and education during his minority, and the amount which might be paid him after attaining majority, as an annual allowance, rested on what the trustees in their discretion might deem warranted by the estate. For by treating G. in the same manner as J. and L. the testator referred only to the mode of payment, and

the power of disposing of the principal, not to the amount of the allowance. *Macdonald v. McLennan*, 176.

2. Will—Construction—Power of sale—Adverse possession of executor—Statute of Limitations—Express trust—R. S. O. ch. 108.]—J. by his will devised to H., his wife, all his real estate in L. “during her natural life, for the use and support of herself and family, and in case H. should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent, and the proceeds thereof to be distributed as follows,” &c.: “But if H. should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs or assigns, after the death of H., share and share alike.” He then nominated P. executor of his will, “with full power and authority to act in the same.” J. died in 1838, leaving H. and three children him surviving. P. took out probate. In 1846, H. by deed conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which he retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.’s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.’s will.

Held, affirming the decision of OSLER, J. A., that P. could not be said to have been an express trustee within R. R. O. ch. 108, sec. 30, and, that being so, the plaintiff’s action was barred by the Statute of Limitations.

The proper construction to be placed on the will was, that a life estate was given to H. with power of sale to P. during her life time with her censem, and the remainder in fee to the children in the event of non-execution of the power: that unless and until the consent of the widow was given, the power of sale did not exist, and the executor had no duty to perform in relation to the lands; and he did not take, nor was it necessary for him to take, the legal estate; that as he never was required to execute the power, he never became trustee.—*Johnson v. Kraemer*, 193.

3. Devise to son who died before testator—R. S. O. ch. 106—Lapse.]—H. made his will on October 10th, 1868, devising land to his son J., without words of limitation, and added a codicil on February 23rd, 1870, by which he confirmed the will save as changed by the codicil. J., the devisee, died February 17th, 1874, and H., the testator, died December 15th, 1879.

Held, That as the will was made and republished by the codicil prior to January 1st, 1874, the sections subsequent to sec. 7 of R. S. O. ch. 106, and among them sec. 35, did not apply, and that under the former law the devise to J. lapsed. *Zunstein v. Hedrick et al.* 338.

4. Construction—Concurrent gift to parents and children—“Heirs”—Guardian of legacy—Trust—Dower—Election—Bequest of annuity to widow.]—A testator, after bequeathing to his wife his dwelling house and furniture, and an annuity, continued as follows:—“I give and bequeath unto G. B., and her children, the dwelling house they now occupy, the wife of C. R. B., and

his children, appointing C. R. B. and G. B. joint guardians for the children above mentioned, and \$500, all transactions to be null and void unless sustained in writing by both guardians." And in the 10th clause of his will he said: "I will and bequeath unto each of my grandchildren living at my death \$100."

C. R. B. was a son of the testator, and had children living at the testator's death.

Held, that the children meant were those of C. R. B. and G. B., and there was a simple gift to G. B. and her children, who took concurrently; and C. R. B. and G. B. were, by the above clause, made trustees for their children, and could give a good acquittance and discharge for the \$500, but they were not authorized to receive, and could not give a good acquittance for the moneys bequeathed to their children in the 10th clause.

In another clause of his will the testator willed and bequeathed "unto G. G. B.'s wife, E. B., \$5,500. This bequest is under the joint management to G. G. B. and his wife for their heirs, should there be none, then at their death to revert back to my heirs to be equally divided."

Held, that there was a trust of the \$5,500 reposed in G. G. B. and E. B.; that E. B. was entitled to the benefit of the trust during her life, and upon her death the benefit of it would go to any children there might be of G. G. and E. B., or any descendants there might be answering the description "their heirs," and if there were no such children or descendants, then to the heirs of the testator, to be equally divided amongst them.

Another clause was as follows: "I will and bequeath unto M. R. B.'s wife and his heirs \$5,000, and ap-

point M. R. B. as guardian and manager of this bequest."

Held, that a trust of the \$5,000 was thereby reposed in M. R. B., and "heirs" was merely descriptive of the legatees intended. M. R. B. was entitled to receive the fund and hold it in trust. During his life his wife would be entitled to the whole benefit arising from the fund, and on his death there would be a distribution of it amongst his wife or her representatives, as the case might be, and those persons who would answer the description of heirs of M. R. B., and M. R. B. as such trustee was entitled to receive, and could give a good acquittance and discharge for, the money.

Held, lastly, that under the will in question the widow was not put to her election. *In re Biggar, Biggar v. Stinson et al.*, 372.

5. *Direction to pay debts—Executors' power to sell lands not devised*—*R. S. O. c. 107, sec. 19.*]—A testator by his will directed his executors to pay his debts, etc., and then proceeded: "The residue of my estate and property which shall not be required for the payment of debts, I give and devise and dispose of as follows." Certain lands were not mentioned.

Held, that, nevertheless, the executors could give a good title to them to a purchaser, for the above words clearly imported an intention that the debts should be paid first out of the estate and property of the testator; this created a charge of the debts upon his lands, and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there was an intestacy as to the part in question in this action, did not detract from

the conclusion that all the lands were so charged. The direction that his debts should be paid by his executors, conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds.

Held, also, that apart from the above R. S. O. ch. 107, sec. 19, covered the case. The testator had not indeed, within the meaning of that section, devised the real estate charged in such terms as that his whole estate and interest therein had had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon, which the Act in effect transmutes into a trust, and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator.

Yost v. Adams et al., 411.

6. Executor to value estate—Certain beneficiaries consulted to exclusion of others—Exercise of quasi-judicial functions by executors.]—A testator provided in his will that on the death of his widow, his executors should have his farm valued, and gave permission to his son E. to take it at their valuation, after which the proceeds were to be divided amongst all his children, of whom the executors were two. E. having made up his mind to take the farm, the executors called in his aid in nominating three valuers, and proceeded to value the farm, he being present, without notifying the other children. There was no evidence that he had attempted to influence the valuers or that they had reached their conclusion in other than a legitimate and upright way, but certain of the children had impeached the valuation as being too low, and asked for administration :

Held, that the executors who were exercising, in some sense, judicial functions, should either have excluded all interested, or should have invited all interested to take part in appointing valuers: that there should therefore be another valuation of the farm, and if the parties desired, it might be referred to the Master, or the executors might, on notice to all interested, proceed to do what was needful in that behalf. *Re Kerr, Kerr et al. v. Kerr et al.*, 484.

7. Quieting title—Devise—Condition—Power of sale.]—The petitioner in a quieting title application claimed title as devisee under a will which contained the following provisions :

“Secondly. I devise to my son J. F. [the land in question], but he is to be known as a sober, steady, and industrious man.

“Thirdly. If at any time during the period of five years after my death, it appears to my executors, hereinafter named, that my said son J. does not remain sober, I give them power to sell and dispose of the said property for such charitable purposes as to them shall seem meet.”

Held, that the power of sale in the will was not void for uncertainty, and that the certificate of title could only issue subject to such power.—*Re Fox and South Half of Lot No. one, etc.*, 489.

8. Devise—Estate—R. S. O. c. 109—Title.]—R. C. by his will devised all his personal estate to his wife M. S. C. to be held for the interest of his son A. S. C. when he should have arrived at the age of 24 years; an annuity to his wife, M. S. C. for life;

appointed her guardian to the son to take charge of all remaining money that should accrue from all sources : such money to be used for the necessary expenses of education, etc., for the son. He desired that the wife should have control of all money coming to the son till he was of the age of 24 years, and at that time all rents and other property should come into his possession except the annuity. He further declared that at the death of the wife all rents, and all interests and all property should pass into the possession of the son, to be owned by him, his heirs and assigns forever. In case of the death of the wife before the son attained 24, another guardian with similar powers was appointed. In case of the death of the son before his mother, then all the property and rents, etc., were to be hers during her natural life, and after her death one half to go to the testator's relatives and the balance to the relatives of the wife, she making this disposition before her death ; but if the son at the time of his death should leave a wife or children, then all property should be subject to such disposition as he should make at the time of his death.

In an application under the Vendors and Purchasers Act R. S. O. c. 109, for the opinion of the Court

Held, that the will was sufficient to pass all the testator's property, including the land in question, that the interest taken by the son was a vested one, and was to come into his possession and control on his attaining 24, and following *Gairdner v. Gairdner*, 1 O. R. 191, that the son having attained that age the subsequent gift never could affect his interest which had become absolute.

If the lands passed by the will, the son and the widow joining as

grantors, could convey such title as the testator had.

If the lands did not pass by the will, the son as heir-at-law, and the widow as to dower could make title. *Re Cooke v. Driffl*, 531.

9. *Devise of mortgage—Maintenance of wife—Principal and interest.]*
—G. H. Z., in his will provided, with respect to a certain mortgage, "I give and bequeath out of the proceeds of said mortgage to each of my daughters (naming them) the sum of \$200 to be paid to them respectively when the youngest reaches the age of 21, and if any of them shall not have been married before that time the child or children being then unmarried shall not receive their shares until such times as she or they shall marry. Provided that my executors may pay such part or parts of said legacies to my married daughters before the youngest attains 21 if they can do so without interfering with the proper support of my wife and family. Provided if any of the daughters die without issue the legacy bequeathed to them shall be divided among their surviving sisters.

"The balance of the proceeds of said mortgage I give and bequeath to my said wife, to have and to hold the same for her use and benefit, and for the use and benefit of the unmarried members of my family, during the natural life of my said wife, after which my will is, that the balance of proceeds of said mortgage still remaining be equally divided among my daughters then surviving."

Held, that the widow held in trust during her life for herself and her unmarried daughter, and that she

was bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried, treating the principal and interest of the mortgage as a blended fund, and what remained was to be divided; and that the widow had the right to draw *bona fide* from the proceeds of the mortgage even if it consumed the whole of the *corpus*.

A matter involving the proper construction of a will cannot be brought up on petition under R. S. O. ch. 107, sec. 35. *Barclay et al. v. Zavitz et al.*, 663.

10. Devise—Rule in Shelley's Case
—Life estate.]—J. S. by his will devised as follows: “I will and bequeath to my son J. S., for the term of his natural life, the farm I purchased * * but if my said son J. should leave lawful heir or heirs, then said lands shall be equally divided among them on the death of their father, but if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands shall be sold, and the proceeds thereof to be equally divided among my remaining children or their heirs.”

The son J. S. had been married for some years at the date of the will, and had a daughter after that date, who with her father was living at the time of the testator's death.

Held, that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee,

under the rule in *Shelley's Case*. *Smith v. Smith*, 677.

Lapse of legacy — Disposal of lapsed legacy by prior will.]—See STATUTES OF MORTMAIN, 1.

WINDING-UP.

Company—Contributory—Laches —Delay in consummating transfer of shares in books of the company—45 Vic. c. 23, D.—See CORPORATIONS, 1.

WORDS.

Express trustee.]—See WILLS, 2.

Running at large.]—See REPLEVIN, 1.

Running at large.]—See RAILWAYS AND RAILWAY COMPANIES, 6.

Sober, steady, and industrious.]—See WILL, 7.

Steadiness.]—See WILL, 1.

UNDUE INFLUENCE.

Parent and child—Alleged final settlement with child.]—See FRAUD AND MISREPRESENTATION, 1.

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